



[4310-6W-P]

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**25 CFR Part 162**

**[Docket ID: BIA-2011-0001]**

**RIN 1076-AE73**

**Residential, Business, and Wind and Solar Resource Leases on Indian Land**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Proposed rule.

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**SUMMARY:** The Bureau of Indian Affairs (BIA) is proposing to revise the regulations addressing non-agricultural leasing of Indian land. This rule would add new subparts to address residential leases, business leases, wind resource evaluation and development leases, and solar resource development leases on Indian land, and would therefore remove the existing subpart for non-agricultural leases.

**DATES:** Comments on this proposed rule must be received by [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. *Comments on the information collections contained in this proposed regulation are separate from those on*

*the substance of the rule.* Comments on the information collection burden should be received by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] to ensure consideration, but must be received no later than [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any of the following methods:

- Federal rulemaking portal: <http://www.regulations.gov>. The rule is listed under the agency name “Bureau of Indian Affairs.” The rule has been assigned Docket ID: BIA-2011-0001. If you would like to submit comments through the Federal e-Rulemaking Portal, go to [www.regulations.gov](http://www.regulations.gov) and do the following. Go to the box entitled “Enter Keyword or ID,” type in “BIA-2011-0001,” and click the “Search” button. The next screen will display the Docket Search Results for the rulemaking. If you click on BIA-2011-0001, you can view this rule and submit a comment. You can also view any supporting material and any comments submitted by others.

- E-mail: [consultation@bia.gov](mailto:consultation@bia.gov). Include the number 1076-AE73 in the subject line of the message.

- Mail: Del Laverdure, Principal Deputy Assistant Secretary – Indian Affairs, U.S. Department of the Interior, Mail Stop 4141, 1849 C Street NW, Washington, DC 20240. Include the number 1076-AE73 on the outer envelope.

- Hand delivery: Del Laverdure, Principal Deputy Assistant Secretary – Indian Affairs, U.S. Department of the Interior, Room 4141, 1849 C Street NW, Washington, DC 20240. Include the number 1076-AE73 on the outer envelope.

We cannot ensure that comments received after the close of the comment period (see DATES) will be included in the docket for this rulemaking and considered.

Comments sent to an address other than those listed above will not be included in the docket for this rulemaking.

Comments on the information collections contained in this proposed regulation are separate from those on the substance of the rule. Send comments on the information collection burden to OMB by facsimile to (202) 395-5806 or e-mail to the OMB Desk Officer for the Department of the Interior at [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov). Please send a copy of your comments to the person listed in the FOR FURTHER INFORMATION CONTACT section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, (202) 273-4680; [Elizabeth.appel@bia.gov](mailto:Elizabeth.appel@bia.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This proposed rule would revise the current 25 CFR 162, Leases and Permits, to establish subparts specifically addressing the following categories of leasing on Indian land: residential; business; wind resource evaluation and development; and solar resource development. Specifically, this rule would:

- Revise Subpart A, General Provisions
- Create a new Subpart C, Residential Leases
- Create a new Subpart D, Business Leases
- Create a new Subpart E, Wind Energy Evaluation Leases (WEELs) and Wind and Solar Resource (WSR) Leases

- Delete Subpart F, Non-agricultural Leases (because that subpart was intended to address residential and business leasing, which this proposed rule addresses specifically in subparts C and D, respectively)
- Move the current Subpart E, Special Requirements for Certain Indian Reservations, to Subpart F
- Create a new Subpart G, Records.

The proposed rule does not affect Subpart B, Agricultural Leases. Subpart B may be revised at a later time. In addition, to ensure that changes to the General Provisions do not affect agricultural lease regulations, the current General Provisions sections are being moved to Subpart B, where they apply only to agricultural leases. Minor edits were made to these General Provisions to delete redundancies and clarify that they now apply only to agricultural leases.

## **II. Summary of Substantive Revisions**

This rule makes the procedures for leasing as explicit and transparent as possible. The consent requirements in the proposed regulations are consistent with the Indian Land Consolidation Act of 2000 (ILCA), as amended by the American Indian Probate Reform Act (AIPRA). Because this statute does not apply to tribes in Alaska, the consent requirements for Alaska remain the same as the previous regulations governing leasing. The proposed regulations provide procedures for approval of lease amendments, assignments, subleases and leasehold mortgages. The current regulations provide for the approval of such instruments, but do not specify the procedure for such approval, leading to the possibility of inconsistencies nationwide, to the detriment of lessees and lenders.

This rule provides that leases on tribal land may be approved for the compensation established in the lease. Leases for less than fair market rental may be approved on individually owned Indian land under certain circumstances.

Subpart C, Residential Leases, addresses leasing for single-family homes and housing for public purposes on Indian land. The proposed regulations provide for a 30-day time frame within which BIA must issue a decision on a complete residential lease application. Bonds are not required for leases for housing for public purposes and otherwise may be waived by BIA upon a determination that it is in the best interest of the landowner(s). Subpart C also includes provisions for enforcement of lease violations.

Subpart D, Business Leases, addresses leasing for business purposes, including: (1) leases for residential purposes that are not covered in Subpart C; (2) leases for business purposes not covered by Subpart E (wind energy evaluation and wind and solar resource development); (3) leases for religious, educational, recreational, cultural, and other public purposes; and (4) commercial or industrial leases for retail, office, manufacturing, storage, biomass, waste-to-energy, and/or other business purposes. The proposed regulations provide for a 60-day time frame within which BIA must issue a decision on a complete business lease application.

Subpart E, WEELs and WSR Leases, establishes procedures for obtaining BIA review and approval of wind energy evaluation leases (WEELs) and wind and solar resource (WSR) development leases. For wind energy, this proposed rule establishes a two-part process whereby developers obtain BIA approval of a short-term lease for possession of Indian land for the purposes of installation and maintenance of wind evaluation equipment, such as meteorological towers. The WEEL may provide the

developer with an option to lease the Indian land for wind energy development purposes.

The environmental reviews conducted for the short-term lease, which would only evaluate the impacts of the evaluation equipment, not the full development of the wind project, may be rolled into environmental reviews conducted for a lease for full development of the wind project. This two-part process is not necessary for solar resource development because solar evaluation does not require possession of the land.

Some of the more notable cross-cutting substantive changes include:

#### BIA Approval Process

- Eliminating the requirement for BIA approval of permits of Indian land;
- Eliminating the requirement for BIA approval of subleases and assignments where certain conditions are met;
- Imposing time limits on BIA to act on requests to approve lease amendments, lease assignments, subleases, and leasehold mortgages;
- Establishing that BIA has 30 days to act on a request to approve a lease amendment or sublease, or the document will be deemed approved;
- Establishing that BIA must approve amendments, assignments, leasehold mortgages, and subleases unless it finds a compelling reason not to, based on certain specified findings.

#### Compensation and Valuations

- Providing that BIA will defer to the tribe's negotiated value for a lease of tribal land and will not require valuation of tribal land;
- Allowing for waivers of valuation for residential leases of individually owned land if the individual landowners provide 100 percent consent and a waiver and

BIA determines it is in the best interest of the landowners (100 percent consent is necessary because non-consenting owners receive fair market value, so a valuation will be necessary if any individual does not consent);

- Allowing short-term leases for wind resource evaluation purposes at the value negotiated by the Indian landowners (whether tribal or individual Indians);
- Allowing alternative forms of rental (other than monetary compensation) if BIA determines it is in the best interest of the Indian landowners;
- Allowing other types of valuation (other than appraisals) under certain circumstances;
- Allowing for automatic rental adjustments and restricting the need for reviews of the lease compensation (to determine if an adjustment is needed) to certain circumstances.

#### Improvements

- Requiring plans of development and schedules for construction of improvements to assist the BIA and Indian landowners in enforcement of diligent development of the leased premises.
- Clarifying that improvements on trust or restricted land are not taxable by States or localities, without regard to ownership. The purposes of residential, business, and WSR leasing on Indian land are to promote Indian housing and to allow Indian landowners to use their land profitably for economic development. These regulations are intended to preempt the field of leasing of Indian lands. The Federal statutory and regulatory scheme for leasing, including the regulation of improvements, is so pervasive as to preclude the additional burden of State

taxation. The assessment of State taxes would obstruct Federal policies supporting tribal economic development and self-determination, and tribal interests in effective tribal government and economic self-sufficiency.

#### Direct Pay

- Allowing for direct pay only where there are 10 or fewer landowners, and all landowners consent to direct pay;
- Continuing direct pay unless and until 100 percent of the owners agree to discontinue direct pay, but suspending direct pay for any one Indian landowner who dies, is declared non compos mentis, or whose whereabouts become unknown.

These changes are intended to increase the efficiency and transparency of the BIA approval process for leasing of Indian land, support tribal decisions regarding the use of their land, increase flexibility in compensation and valuations, and facilitate management of direct pay.

### **III. Procedural Requirements**

- A. Regulatory Planning and Review (E.O. 12866)
- B. Regulatory Flexibility Act
- C. Small Business Regulatory Enforcement Fairness Act
- D. Unfunded Mandates Reform Act
- E. Takings (E.O. 12630)
- F. Federalism (E.O. 13132)
- G. Civil Justice Reform (E.O. 12988)
- H. Consultation with Indian Tribes (E.O. 13175)
- I. Paperwork Reduction Act
- J. National Environmental Policy Act
- K. Effects on the Energy Supply (E.O. 13211)
- L. Clarity of this Regulation
- M. Public Availability of Comments



### **III. Procedural Requirements**

#### **A. Regulatory Planning and Review (E.O. 12866)**

The Office of Management and Budget (OMB) has determined that this rule is significant under Executive Order 12866. This rule replaces provisions that apply to non-agricultural leasing of Indian land, generally, with provisions that apply specifically to the different types of non-agricultural leasing: residential, business, and wind and solar resource leasing of Indian land. This rule describes how the BIA will administer residential, business, and wind and solar resource leases on trust and restricted land. Thus, the impact of the rule is confined to the Federal Government and individual Indian and tribal landowners and does not impose a compliance burden on the economy generally or create any inconsistencies or budgetary impacts to any other agency or Federal program.

(1) This rule will not have an annual effect of \$100 million or more on the economy or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule makes changes to promote economic development on Indian land through, for example, providing greater transparency to procedures for obtaining BIA approval, imposing timelines on BIA to act on certain lease requests, and establishing that BIA will defer to tribes' negotiated values. The rule's changes will not have direct effects on the economy as a whole; however, the changes should result in increased leasing of Indian land, which will have a beneficial effect on tribal economies and communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency because the Department is the only agency with authority for approving leases on Indian land. We have coordinated with the Department of Housing and Urban Development (HUD) to ensure that the leasing procedures will not impede Indian landowners' ability to obtain HUD-funding for residences.

(3) This rule does involve entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The revisions have no budgetary effects and do not affect the rights or obligations of any recipients.

(4) This rule may raise novel legal or policy issues because it alters established procedures for reviewing and approving leases of Indian land.

#### **B. Regulatory Flexibility Act**

The Department of the Interior certifies that this proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Small entities are not likely to enter into residential leases on Indian land because tribal housing authorities and tribal members usually enter into such leases. It is possible that small entities may enter into business leases or wind or solar resources leases but this rule does not impose any new

requirements in obtaining or complying with a lease that would have a significant economic effect on those entities.

### **C. Small Business Regulatory Enforcement Fairness Act**

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule continues to require lessees to pay at least fair market rental, with certain exceptions, and adds that lessees agree to some other amount negotiated by the Indian tribe under certain circumstances. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule is limited to Indian land and is intended to promote economic development.

### **D. Unfunded Mandates Reform Act**

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

### **E. Takings (E.O. 12630)**

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable "taking." A takings implication assessment is not required.

**F. Federalism (E.O. 13132)**

Under the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule governs leasing on Indian land, which is land held by the Federal Government in trust or restricted status for individual Indians or Indian tribes. Such land is subject to tribal law and Federal law, only, except in limited circumstances and areas where Congress or a Federal court has made State law applicable. This rule therefore does not affect the relationship between the Federal Government and States or among the various levels of government.

**G. Civil Justice Reform (E.O. 12988)**

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

**H. Consultation with Indian Tribes (E.O. 13175)**

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on federally recognized Indian tribes and Indian trust assets. During the development of this proposed rule, the Department discussed the rule

with tribal representatives at several consultation sessions. We distributed a preliminary draft of the rule to tribes in February 2011 and held three consultation sessions:

Thursday, March 17, 2011 at the Reservation Economic Summit (RES) 2011 in Las Vegas; March 31, 2011 in Minnesota; and April 6, 2011, in Albuquerque, New Mexico.

We requested that tribes submit written comments by April 18, 2011. We received written and oral comments from over 70 Indian tribes during tribal consultation. We reviewed each comment in depth and revised the rule accordingly. This proposed rule incorporates those revisions. We also compiled a summary of tribal comments received and our responses to those comments and are making that document available to tribes at: <http://www.bia.gov/WhoWeAre/AS-IA/Consultation/index.htm>. We plan to hold additional tribal consultation sessions, particularly in the geographic areas we were not able to reach prior to this proposed rule. We will announce the dates and locations of the additional tribal consultation sessions by letter to tribal leaders.

#### **I. Paperwork Reduction Act**

OMB Control No. 1076-0155 currently authorizes the collections of information contained in 25 CFR part 162, totaling an estimated 106,065 annual burden hours. If this proposed rule is finalized, the annual burden hours will increase by an estimated 2,910 hours. Because the sections where the information collections occur changes, we are including a table showing the section changes and whether a change to the information collection requirement associated with those sections has changed.

<b>Current CFR Cite</b>	<b>New CFR Cite</b>	<b>Information Collection Requirement</b>	<b>Explanation of Change</b>
162.109 162.204 162.205	162.109 162.204 162.205 162.338(e) 162.438(e)	Provide notice of tribal leasing laws, regulations, exemptions	No change. Previously required, but now listed in specific subparts.

	162.528(d) 162.568(e)		
---	162.320(a), 321(a) 162.420(a), 421(a) 162.546(a), 162.547(a)	Request for fair market rental/valuation on tribal land	New.
---	162.320(b), 321(b) 162.420(b), 421(b) 162.546(b), 162.547(b)	Request for waiver of fair market rental/valuation for individually owned land	New.
---	162.324 162.424 162.550	Agreement to suspend direct pay.	New.
---	162.368 162.468 162.593	Notification of good faith negotiations with holdover.	New.
162.207 162.242-244 162.604(a) 162.610	162.009 162.207 162.242-244, 162. 345, 350, 353, 357 162. 445, 450, 453, 457 162. 530 162.570, 574, 578, 582	Submit lease, assignment, amendment, leasehold mortgage for approval	No change. Previously required, but now listed in separate subparts.
162.213 162.604(a)	162.024 162.213 162.338 162.438 162.528 162.563	Provide supporting documentation	No change. Previously required, but now listed in separate subparts.
---	162.004	Submit permits to BIA for file	Permits must now be submitted to BIA for file.
162.217 162.246	162.217 162.246 162.341 162.441 162.566	Submit lease for recording	No change. Previously required, but now listed in separate subparts.
162.234 162.604(c)	162.234 162.334 162.434 162.525 162.559	Provide a bond	No change. Previously required, but now listed in separate subparts.
162.237 162.604(d)	162.237 162.337 162.437 162.527 162.562	Provide information for acceptable insurance	No change. Previously required, but now listed in separate subparts.
162.241	162.241	Administrative fees	No change.
162.247, 162.613	162.247 162.325, 329 162.425, 429 162.523, 551, 555	Pay rent	No change. Previously required, but now listed in separate subparts.
162.248, 162.616	162.248, 162.365 162.465 162.590	Pay penalties for late payment	No change. Previously required, but now listed in separate subparts.
162.212 162.606	162.009 162.212	Bidding on advertised lease	No change. Previously required, but now listed in separate subparts.
162.603	162.008(b)(2)	Use of minor's land	No change. Previously required, but now listed in separate subparts.
162.251, 162.618	162.251 162.363 162.463 162.588	Provide notice of curing violation	No change. Previously required, but now listed in separate subparts.
162.256, 162.623	162.256 162.368 162.468 162.593	Respond to notice of trespass	No change. Previously required, but now listed in separate subparts.

162.113	162.022 162.113	Appealing decisions	No change. Previously required, but now listed in separate subparts.
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The table showing the burden of the information collection is included below for your information.

CFR Cite	Description	Respondent Type	No. Respondents	Annual Responses	Burden Hours per Response	Total Annual Burden Hours
162.109, 162.204, 162.205, 162.338(e) 162.438(e) 162.528(d) 162.568(e)	Provide notice of tribal leasing laws, regulations, exemptions	Tribal	500	500	0.5	250
162.320(a), 321(a) 162.420(a), 421(a) 162.546(a), 162.547(a)	Request for fair market rental/valuation on tribal land	Tribal	50	50	0.5	25
162.320(b), 321(b) 162.420(b), 421(b) 162.546(b), 162.547(b)	Request for waiver of fair market rental/valuation for individually owned land	Individuals	5,000	5,000	0.5	2,500
162.324 162.424 162.550	Agreement to suspend direct pay.	Individuals	20	20	0.5	10
162.368 162.468 162.593	Notification of good faith negotiations with holdover.	Tribal	100	100	0.5	50
		Individuals	500	500	0.5	250
162.009 162.207, 242-244 162, 345, 350, 353, 357 162.445, 450, 453, 457 162.530, 570, 574, 578, 582	Submit lease, assignment, amendment, leasehold mortgage for approval	Individuals	10,000	10,000	1	10,000
		Businesses	2500	2500	1	2,500
		Tribal	2000	2000	1	2,000
162.024 162.213 162.338 162.438 162.528 162.563	Provide supporting documentation	Individuals	5,000	5,000	0.25	1,250
		Businesses	2,000	2,000	0.25	500
		Tribal	250	250	0.25	62.5
162.004	Submit permits to BIA for file	Individuals	100	100	0.25	25
		Businesses	100	100	0.25	25
		Tribal	100	100	0.25	25
162.217 162.246 162.341 162.441 162.566	Submit lease for recording	Individuals	10,000	10,000	0.5	5,000
		Businesses	2500	2500	0.5	1,250
		Tribal	2000	2000	0.5	1,000
162.234 162.334 162.434 162.525 162.559	Provide a bond	Individuals	10,000	10,000	0.5	5,000
		Businesses	2500	2500	0.5	1,250
		Tribal	2000	2000	0.5	1,000
162.237	Provide information	Individuals	10,000	10,000	0.25	2,500

162.337 162.437 162.527 162.562	for acceptable insurance	Businesses	2500	2500	0.25	625
		Tribal	2000	2000	0.25	500
162.241	Administrative fees	Individuals	10,000	10,000	2	20,000
		Businesses	2500	2500	2	5,000
		Tribal	2000	2000	2	4,000
162.247 162.325, 329 162.425, 429 162.523, 551, 555	Pay rent	Individuals	10,000	10,000	0.25	2,500
		Businesses	2500	2500	0.25	625
		Tribal	2000	2000	0.25	500
162.248 162.365 162.465 162.590	Pay penalties for late payment	Individuals	3,000	3,000	0.25	750
		Businesses	600	600	0.25	150
		Tribal	25	25	0.25	6
162.009 162.212	Bidding on advertised lease	Individuals	10,000	10,000	1	10,000
		Businesses	2500	2500	1	2,500
		Tribal	2000	2000	1	2,000
162.008(b)(2)	Use of a minor's land	All	7,250	7,250	3	21,750
162.251 162.363 162.463 162.588	Provide notice of curing violation	Individuals	100	100	0.5	50
		Businesses	45	45	0.5	23
162.256 162.368 162.468 162.593	Respond to notice of trespass	Individuals	100	100	0.5	50
		Businesses	45	45	0.5	23
162.022 162.113	Appealing decisions	Individuals	400	400	2	800
		Businesses	225	225	2	450
		Tribal	100	100	2	200
	Total		14,500	127,110		108,975

BIA invites comments on the information collection requirements in the proposed regulation. You may submit comments to OMB by facsimile to (202) 395-5806 or you may send an e-mail to the attention of the OMB Desk Officer for the Department of the Interior: [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov). Please send a copy of your comments to the person listed in the FOR FURTHER INFORMATION CONTACT section of this notice.

*Note that the request for comments on the rule and the request for comments on the information collection are separate.* To best ensure consideration of your comments on the information collection, we encourage you to submit them by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]; while OMB has 60



days from the date of publication to act on the information collection request, OMB may choose to act on or after 30 days. Comments on the information collection should address: (a) the necessity of this information collection for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology. Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number.

#### **J. National Environmental Policy Act**

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because these are “regulations... whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 43 CFR 46.210(j). No extraordinary circumstances exist that would require greater NEPA review.

#### **K. Effects on the Energy Supply (E.O. 13211)**

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

#### **L. Clarity of this Regulation**

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the "COMMENTS" section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

#### **M. Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

#### **List of Subjects**

##### 25 CFR Part 162

Indians-lands.

For the reasons stated in the preamble, the Department of the Interior, Bureau of

Indian Affairs, proposes to amend part 162 in Title 25 of the Code of Federal Regulations as follows:

## **PART 162--LEASES AND PERMITS**

1. Revise the authority citation for part 162 to read as follows:

Authority: 5 U.S.C. 301, R.S. 463 and 465; 25 U.S.C. 2 and 9. Interpret or apply sec. 3, 26 Stat. 795, sec. 1, 28 Stat. 305, secs. 1, 2, 31 Stat. 229, 246, secs. 7, 12, 34 Stat. 545, 34 Stat. 1015, 1034, 35 Stat. 70, 95, 97, sec. 4, 36 Stat. 856, sec. 1, 39 Stat. 128, 41 Stat. 415, as amended, 751, 1232, sec. 17, 43 Stat. 636, 641, 44 Stat. 658, as amended, 894, 1365, as amended, 47 Stat. 1417, sec. 17, 48 Stat. 984, 988, 49 Stat. 115, 1135, sec. 55, 49 Stat. 781, sec. 3, 49 Stat. 1967, 54 Stat. 745, 1057, 60 Stat. 308, secs. 1, 2, 60 Stat. 962, sec. 5, 64 Stat. 46, secs. 1, 2, 4, 5, 6, 64 Stat. 470, 69 Stat. 539, 540, 72 Stat. 968, 107 Stat. 2011, 108 Stat. 4572, March 20, 1996, 110 Stat. 4016; 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c, 409a, 413, 415, 415a, 415b, 415c, 415d, 477, 635, 2201 et seq., 3701, 3702, 3703, 3712, 3713, 3714, 3715, 3731, 3733, 4211; 44 U.S.C. 3101 et seq.

2. Remove §162.100.

3. Redesignate §162.101 – §162.113 in subpart A as §162.101 - §162.113 in subpart B.

4. Revise subpart A to read as follows:

## **PART 162 – Leases and Permits**

### **Subpart A – General Provisions**

#### *Purpose, Definitions, and Scope*

Sec.

- |         |   |
|---------|---|
| 162.001 | What is the purpose of this part?                 |
| 162.002 | How is this part subdivided?                      |
| 162.003 | What key terms do I need to know?                 |
| 162.004 | May BIA approve or grant permits under this part? |

#### *When to Get a Lease*

- |         |  |
|---------|--|
| 162.005 | When does this part apply?                                     |
| 162.006 | To what land does this part apply?                             |
| 162.007 | To what types of land use agreements does this part not apply? |
| 162.008 | When do I need a lease to authorize possession of Indian land? |

#### *How to Get a Lease*

- 162.009 How do I obtain a lease?
- 162.010 How does a prospective lessee identify and contact Indian landowners to negotiate a lease?
- 162.011 What are the consent requirements for a lease?
- 162.012 Who is authorized to consent to a lease?

#### *Lease Administration*

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- 162.022 May decisions under this part be appealed?
- 162.023 Who may I contact with questions concerning the leasing process?
- 162.024 What documentation may BIA require in approving, administering, and enforcing leases?

### **Subpart A—General Provisions**

#### *Purpose, Definitions, and Scope*

#### **§ 162.001 What is the purpose of this part?**

This part identifies:

- (a) Conditions and authorities under which we will approve leases of Indian land and may issue permits on Government land;
- (b) How to obtain leases;
- (c) Terms and conditions required in leases;
- (d) How we administer and enforce leases; and
- (e) Special requirements for leases made under special acts of Congress that apply only to certain Indian reservations.

## **§ 162.002 How is this part subdivided?**

(a) This part includes multiple subparts relating to:

(1) General Provisions (Subpart A);

(2) Agricultural Leases (Subpart B);

(3) Residential Leases (Subpart C);

(4) Business Leases (Subpart D);

(5) Wind Energy Evaluation, Wind Resource, and Solar Resource Leases (Subpart E);

(6) Special Requirements for Certain Reservations (Subpart F);

(7) Records (Subpart G).

(b) Subpart F identifies special provisions applicable only to leases made under special acts of Congress that apply only to certain Indian reservations. Leases covered by Subpart F are also subject to the provisions in subparts A through G, except to the extent that subparts A through G are inconsistent with the provisions in subpart F or any act of Congress under which the lease is made.

(c) Leases covered by Subpart B are not subject to the provisions in subpart A. Leases covered by subpart B are subject to the provisions in subpart G, except that if a provision in subpart B conflicts with a provision of subpart G, then the provision in subpart B will govern.

## **§ 162.003 What key terms do I need to know?**

Adult means a person who is 18 years of age or older.

Appeal bond means a bond posted upon filing of an appeal that provides a security or guaranty if an appeal creates a delay in implementing a BIA decision that could cause a significant and measurable financial loss to another party.

Approval means written authorization by the Secretary or a delegated official or, where applicable, the “deemed approved” authorization of an amendment or sublease.

Assignment means an agreement between a lessee and an assignee, whereby the assignee acquires all or some of the lessee's rights, and assumes all or some of the lessee's obligations, under a lease.

BIA means the Secretary of the Interior or the Bureau of Indian Affairs within the Department of the Interior and any tribe acting on behalf of the Secretary or Bureau of Indian Affairs under § 162.015, except that this term means only the Secretary of the Interior or Bureau of Indian Affairs if the function is an inherently Federal function.

Business day means Monday through Friday, excluding federally recognized holidays and other days that the applicable office of the Federal Government is closed to the public.

Consent or consenting means written authorization by an Indian landowner to a specified action.

Constructive notice means:

(1) Public notice posted at the tribal government office, tribal community building, and/or the United States Post Office; and

(2) Notice published in the local newspaper(s) nearest to the affected land and/or announced on a local radio station(s).

Court of competent jurisdiction means a Federal, tribal, or State court with jurisdiction.

Day means a calendar day, unless otherwise specified.

Emancipated minor means a person less than 18 years of age who is married or who is determined by a court of competent jurisdiction to be legally able to care for himself or herself.

Equipment installation plan means a plan that describes the type and location of any improvements to be installed by the lessee to evaluate the resources and a schedule showing the tentative commencement and completion dates for installation of those improvements.

Fair market rental means the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market, or as determined by competitive bidding.

Fee interest means an interest in land that is owned in unrestricted fee status, and is thus freely alienable by the fee owner.

Fractionated tract means a tract of Indian land owned in common by Indian landowners and/or fee owners holding undivided interests therein.

Government land means any tract, or interest therein, in which the surface estate is owned and administered by the United States, not including tribal land that has been reserved for administrative purposes.

Holdover means circumstances in which a lessee remains in possession of the leased premises after the lease term expires.

Housing for public purposes means multi-family developments and single-family residential developments (i) administered by a tribe, Tribally-Designated Housing Entity, or a tribally-sponsored or tribally sanctioned not-for-profit entity; or (ii) substantially financed using a tribal, Federal, or State housing assistance program or not-for profit entity.

Immediate family means a spouse, brother, sister, aunt, uncle, niece, nephew, first cousin, lineal ancestor, lineal descendant, or member of the household.

Improvements means buildings, other structures, and associated infrastructure constructed or installed under a lease to serve the purposes of the lease.

Indian means:

(1) Any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner as of October 27, 2004, of a trust or restricted interest in land;

(2) Any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(3) With respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to 25 U.S.C. 2206, any person described in paragraph (1) or (2) or any person who owns a trust or restricted interest in a parcel of such land in that State.

Indian land means any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status and includes both individually owned Indian land and tribal land.



Indian landowner means a tribe or individual Indian who owns an interest in Indian land.

Individually owned Indian land means any tract, or interest therein, in which the surface estate is owned by an individual Indian in trust or restricted status.

Indian tribe means an Indian tribe under section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

Interest, when used with respect to Indian land, means an ownership right to the surface estate of Indian land.

Lease means a written contract between Indian landowners and a lessee, whereby the lessee is granted a right to possession of Indian land, for a specified purpose and duration.

Leasehold mortgage means a mortgage, deed of trust, or other instrument that pledges a lessee's leasehold interest as security for a debt or other obligation owed by the lessee to a lender or other mortgagee.

Lessee means person or entity who has acquired a legal right of possession to Indian land by a lease under this part.

Life estate means an interest in property held only for the duration of a designated person's life. A life estate may be created by a conveyance document or by operation of law.

LTRO means the Land Titles and Records Office of the BIA.

Mail means mailing by U.S. Postal Service or commercial delivery service.

Minor means an individual who is less than 18 years of age.

Nominal rental or nominal compensation means a rental amount that is so insignificant that it bears no relationship to the value of the property that is being leased.

Non compos mentis means a person who has been legally determined by a court of competent jurisdiction to be of unsound mind or incapable of managing his or her own affairs.

Notice of violation means a letter notifying the lessee of a violation of the lease and providing the lessee with a specified period of time to show cause why the lease should not be cancelled for the violation. A 10-day show cause letter is one type of notice of violation.

Orphaned minor means a minor who does not have one or more guardians duly appointed by a court of competent jurisdiction.

Performance bond means security for the performance of certain lease obligations, as furnished by the lessee, or a guaranty of such performance as furnished by a third-party surety.

Permit means a written, non-assignable agreement between Indian landowners or BIA and the permittee, whereby the permittee is granted a temporary, revocable privilege to use Indian land or Government land, for a specified purpose.

Permittee means a person or entity who has acquired a legal right of use to Indian land or Government land by a permit.

Power of attorney means an authority by which one person enables another to act for him/her as attorney in fact.

Remainder interest means an interest in Indian land that is created at the same time as a life estate, for the use and enjoyment of its owner after the life estate terminates.

Restoration and reclamation plan means a plan that defines the reclamation, revegetation, restoration, and soil stabilization requirements for the project area, and requires the expeditious reclamation of construction areas and revegetation of disturbed areas to reduce invasive plant infestation and erosion.

Secretary means the Secretary of the Interior.

Single-family residence means a building with one to four dwelling units on a tract of land under a single residential lease, or as defined by tribal zoning law or other tribal authorization.

Single-family residential development means one or more single-family residences owned, managed, or developed by a single entity.

Sublease means a written agreement by which the lessee grants to an individual or entity a right to possession less than that held by the lessee under the lease.

Surety means one who guarantees the performance of another.

Trespass means any unauthorized occupancy, use of, or action on any Indian land or Government land.

Tribal authorization means a duly adopted tribal resolution, tribal ordinance, or other appropriate tribal document authorizing the specified action.

Tribally Designated Housing Entity means a tribally designated housing entity under 25 U.S.C. 4103(21).

Tribal land means the surface estate of lands or any interest therein, title to which is held by the United States in trust for one or more tribes, or title to which is held by one or more tribes subject to Federal restrictions against alienation or encumbrance, and includes such lands reserved for BIA administrative purposes. The term also includes the

surface estate of lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).

Tribal law means the body of non-Federal law that governs lands and activities under the jurisdiction of a tribe, including ordinances or other enactments by the tribe, and tribal court rulings.

Tribal land assignment means a contract or agreement that conveys to tribal members any rights for the temporary use of tribal lands, assigned by an Indian tribe in accordance with tribal laws or customs.

Trust or restricted land or trust or restricted status means any tract, or interest therein, that the United States holds in trust for the benefit of one or more tribes or individual Indians, or any tract, or interest therein, that one or more tribes or individual Indians holds title to, but can only alienate or encumber with the approval of the United States because of limitations contained in the conveyance instrument pursuant to Federal law or limitations contained in Federal law.

Undivided interest means a fractional share in the surface estate of Indian land, where the surface estate is owned in common with other Indian landowners or fee owners.

Us/we/our means the Secretary or the Bureau of Indian Affairs (BIA) and any tribe acting on behalf of the Secretary or BIA under § 162.015, except that this term means only the Secretary or BIA if the function is an inherently Federal function.

Uniform Standards of Professional Appraisal Practice (USPAP) means the standards promulgated by the Appraisal Standards Board of the Appraisal Foundation to establish requirements and procedures for professional real property appraisal practice.

Violation means a failure to take an action, including payment of compensation, when required by the lease, or to otherwise not comply with a term of the lease. This definition applies for purposes of this part no matter how “violation” or “default” is defined in the lease.

**§ 162.004 May BIA approve or grant permits under this part?**

(a) Permits for the use of Indian land do not require our approval; however, you must fulfill the following requirements:

(1) Ensure that permitted activities comply with all applicable environmental and cultural resource laws; and

(2) Submit all permits to the appropriate BIA office for us to confirm that the document meets the definition of “permit” and does not grant an interest in Indian land and allow us to maintain a copy of the permit in our records.

(b) The following table provides characteristics of permits versus leases.

<b>Permit</b>	<b>Lease</b>
Does not grant a legal interest in Indian land.	Grants a legal interest in Indian land.
Shorter term	Longer term
Limited use	Broader use with associated infrastructure
Subject to unlimited access by others	Lessee has right of possession, ability to limit or prohibit access by others
Indian landowner may terminate at any time	Indian landowner may terminate under limited circumstances

(c) We may grant permits for the use of Government land. The leasing regulations in this part will apply to such permits, as appropriate.

*When to Get a Lease*

**§ 162.005 When does this part apply?**

(a) This part applies to all leases, amendments, assignments, subleases, and leasehold mortgages submitted to BIA for approval after [INSERT FINAL RULE EFFECTIVE DATE].

(b) If the terms of a lease document approved by BIA prior to [INSERT FINAL RULE EFFECTIVE DATE] conflict with this part, the terms of the lease document govern.

(c) We may amend this part at any time.

**§ 162.006 To what land does this part apply?**

(a) This part applies to Indian land and Government land, including any tract in which an individual Indian or tribe owns an interest in trust or restricted status.

(1) We will not lease fee interests or collect rent on behalf of fee interest owners. We will not condition our approval of a lease of the trust and restricted interests on a lease having been obtained from the owners of any fee interests.

(2) We will not include the fee interests in a tract in calculating the applicable percentage of interests required for consent to a lease document.

(b) This paragraph applies if there is a life estate on the land to be leased.

(1) When all of the trust or restricted interests in a tract are subject to a life estate, the life tenant may lease the land without our approval, for the duration of the life estate.

The following conditions apply:

(i) Such a lease must be recorded;

(ii) The lessee must pay rent directly to the life tenant under the terms of the lease;

(iii) We may monitor the use of the land on behalf of the owners of the remainder interests, as appropriate, but will not be responsible for enforcing the lease on behalf of the life tenant.

(iv) We will not lease the remainder interests or join in a lease by the life tenant on behalf of the owners of the remainder interests except as needed to preserve the value of the land;

(v) We will not lease on the life tenant's behalf, but we may collect rents on behalf of the life tenant; and

(vi) We will be responsible for enforcing the terms of the lease on behalf of the owners of the remainder interests.

(2) When less than all of the trust or restricted interests in a tract are subject to a life estate, the life tenant may not lease the land unless the remainder interests are also leased. The following conditions apply:

(i) We will not lease on the life tenant's behalf, but we may collect rents on behalf of the life tenant; and

(ii) We will be responsible for enforcing the terms of the lease on behalf of the owners of the remainder interests.

(3) Rent payable under the lease will be paid to the life tenant in accordance with Part 179 of this chapter, unless the document creating the life estate provides otherwise.

(4) All leases entered into by life tenants must be recorded in our Land Titles and Records Office, even where our approval is not required.

**§ 162.007 To what types of land use agreements does this part not apply?**

(a) This part does not apply to the following types of land use agreements:

<b>This part does not apply to...</b>	<b>which are covered by...</b>
Mineral leases, prospecting permits, or mineral development agreements	25 CFR parts 211, 212 and 225
Grazing permits	25 CFR part 166
Timber contracts	25 CFR part 163

Contracts or agreements that encumber tribal land	25 U.S.C. 81
Rights-of-way	25 CFR part 169
Tribal land assignments and similar instruments authorizing temporary uses	tribal laws
Traders' licenses	25 CFR part 140

(b) This part does not apply to leases of water rights associated with Indian land, except to the extent the use of such water rights is incorporated in a lease of the land itself.

### **§ 162.008 When do I need a lease to authorize possession of Indian land?**

(a) You need a lease under this part to possess Indian land if you meet one of the criteria in the following table.

<b>If you are...</b>	<b>then you must obtain a lease under this part...</b>
(1) A person or legal entity (including an independent legal entity owned and operated by a tribe) who is not an owner of the Indian land	from the owners of the land before taking possession of the land or any portion thereof.
(2) An Indian landowner of a fractional interest in the land	from the owners of other trust and restricted interests in the land, unless those owners have given you permission to take or continue in possession without a lease.

(b) You do not need a lease to possess Indian land if you meet any of the criteria in the following table.

<b>You do not need a lease if you are...</b>	<b>but the following conditions apply...</b>
(1) An Indian landowner who owns 100 percent of the trust or restricted interests in a tract.	--
(2) A parent or guardian of a minor child who owns 100 percent of the trust interests in the land	(1) We may require you to provide evidence of a direct benefit to the minor child; and



	(2) When the child is no longer a minor, you must obtain a lease to authorize continued possession.
(3) A 25 U.S.C. 477 corporate entity that holds the Indian land directly under its Federal charter (not pursuant to a lease from the Indian tribe)	You must record documents in accordance with § 162.341, §162.441, and §162.566.
(4) A person or legal entity that is leasing Indian land under a special act of Congress authorizing leases without our approval	You must record documents in accordance with § 162.341, §162.441, and §162.566.

(c) Landowners who enter into an agreement under paragraph (a)(2) may wish to consider documenting such an agreement and recording it in the LTRO.

### *How to Get a Lease*

#### **§ 162.009 How do I obtain a lease?**

(a) This section establishes the basic steps to obtain a lease.

(1) Prospective lessees must:

(i) Directly negotiate with Indian landowners for a lease; and

(ii) Notify all Indian landowners and obtain the consent of the Indian landowners of the applicable percentage of interests, for fractionated tracts; and

(2) Prospective lessees and Indian landowners must:

(i) Prepare the required information and analyses, including information to facilitate BIA's analysis under applicable environmental and cultural resource requirements; and

(ii) Ensure the lease complies with the requirements in subpart B for agricultural leases, subpart C for residential leases, subpart D for business leases, and subpart E for wind energy evaluation, wind resource, or solar resource leases; and

(3) Prospective lessees and/or Indian landowners must submit the lease, and required information and analyses, to the BIA office with jurisdiction over the lands covered by the lease for our review and approval.

(b) Generally, residential, business, wind energy evaluation, wind resource, and solar resource leases will not be advertised for competitive bid.

**§ 162.010 How does a prospective lessee identify and contact Indian landowners to negotiate a lease?**

(a) Prospective lessees may submit a written request to us to obtain the following information for the purpose of negotiating a lease:

- (1) Names and addresses of the Indian landowners or their representatives;
- (2) Information on the location of the parcel; and
- (3) The percentage of undivided interest owned by each Indian landowner.

(b) We may assist prospective lessees in contacting the Indian landowners or their representatives for the purpose of negotiating a lease, upon request.

(c) We will assist the Indian landowners in those negotiations, upon their request.

**§ 162.011 What are the consent requirements for a lease?**

(a) For fractionated tracts:

(1) Except in Alaska, the owners of the following percentage of undivided trust or restricted interests in a fractionated tract of Indian land must consent to a lease of that tract:

<b>If the number of owners of the undivided trust or restricted interest in the tract is...</b>	<b>Then the required percentage of the undivided trust or restricted interest is...</b>
(i) One to five,	90 percent;

(ii) Six to 10,	80 percent;
(iii) 11 to 19,	60 percent;
(iv) 20 or more,	Over 50 percent.

(2) Leases in Alaska require consent of all of the Indian landowners in the tract.

(3) If the prospective lessee is also an Indian landowner, their consent will be included in the percentages in paragraphs (a)(1) and (a)(2).

(4) Where owners of the applicable percentages in paragraph (a)(1) consent to a lease document:

(i) That lease document binds all non-consenting owners to the same extent as if those owners also consented to the lease document.

(ii) That lease document will not bind a non-consenting Indian tribe, except with respect to the tribally owned fractional interest, and the non-consenting Indian tribe will not be treated as a party to the lease. Nothing in this paragraph shall be construed to affect the sovereignty or sovereign immunity of the Indian tribe.

(5) We will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the percentages in paragraph (a)(1) based on our records on the date on which the lease is submitted to us for approval.

(b) Tribal land subject to a tribal land assignment may only be leased with the consent of the tribe.

#### **§ 162.012 Who is authorized to consent to a lease?**

(a) Indian tribes, adult Indian landowners, or emancipated minors, may consent to a lease of their land, including undivided interests in fractionated tracts.

(b) The following individuals or entities may consent on behalf of an individual Indian landowner:

- (1) An adult with legal custody acting on behalf of his or her minor children;
- (2) A guardian, conservator, or other fiduciary appointed by a court of competent jurisdiction recognized to act on behalf of an individual Indian landowner;
- (3) Any person who is authorized to practice before the Department of the Interior under 43 CFR part 1 and has been retained by the Indian landowner;
- (4) BIA, under the circumstances in paragraph (c) of this section; or
- (5) An adult or legal entity who has been given a written power of attorney that:
  - (i) Meets all of the formal requirements of any applicable law under § 162.013;and
  - (ii) Identifies the attorney-in-fact; and
  - (iii) Describes the scope of the powers granted, to include leasing land, and any limits on those powers.

(c) BIA may give written consent to a lease, and that consent must be counted in the percentage ownership described in § 162.011, on behalf of:

- (1) The individual owner if the owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined;
- (2) Individuals whose whereabouts are unknown to us, after we make a reasonable attempt to locate such individuals;
- (3) Individuals who are found to be non compos mentis, or determined to be an adult in need of assistance or under legal disability as defined in part 115 of this chapter;

(4) Orphaned minors who do not have guardians duly appointed by a court of competent jurisdiction;

(5) Individuals who have given us a written power of attorney to lease their land;  
or

(6) The individual Indian landowners of a fractionated tract where:

(i) We have given the Indian landowners written notice of our intent to consent to a lease on their behalf;

(ii) The Indian landowners are unable to agree upon a lease during a three month negotiation period following the notice; and

(iii) The land is not being used by an Indian landowner under § 162.008(b)(1).

#### *Lease Administration*

### **§ 162.013 What laws will apply to leases approved under this part?**

(a) In addition to the regulations in this part, leases approved under this part are subject to:

(1) Applicable Federal laws and any specific Federal statutory requirements that are not incorporated in this part;

(2) Tribal law, subject to paragraph (b) of this section; and

(3) State law, in the specific areas and circumstances in Indian country where Congress or a Federal court has made it expressly applicable.

(b) If any regulation in this part conflicts with a tribal law, the Secretary may waive the application of such regulation to tribal land, unless the waiver would:

(1) Violate a Federal statute or judicial decision; or

(2) Conflict with the United States' trust responsibility under Federal law.

(c) The parties to a specific lease may subject it to State or local law in the absence of Federal or tribal law, if:

(1) The lease includes a provision to this effect; and

(2) The Indian landowners expressly agree to the application of State or local law.

(d) An agreement under paragraph (c) of this section does not waive a tribe's sovereign immunity unless the tribe expressly states its intention to waive sovereign immunity in the lease of tribal land.

**§ 162.014 Will BIA comply with tribal laws in making decisions regarding leases?**

Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws relating to land use, environmental protection, and historic or cultural preservation.

**§ 162.015 May tribes administer this part on BIA's behalf?**

A tribe or tribal organization may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f et. seq.) to administer any portion of this part that is not an inherent Federal function.

**§ 162.016 May a lease address access to the leased premises by roads or other infrastructure?**

A lease may address access to the leased premises by roads or other infrastructure, as long as the access complies with applicable statutory and regulatory requirements, including 25 CFR 169.

**§ 162.017 May a lease combine tracts with different Indian landowners?**

(a) We may approve a lease that combines multiple tracts of Indian land into a unit, if we determine that unitization is:

(1) In the Indian landowners' best interest; and

(2) Consistent with the efficient administration of the land.

(b) For a lease that covers multiple tracts, the minimum consent requirements apply to each tract separately.

(c) Unless the lease provides otherwise, the rent or other compensation will be prorated in proportion to each tract acreage contribution to the entire lease. Once prorated per tract, the rent will be distributed to the owners of each tract based upon their respective percentage interest in that particular tract.

**§ 162.018 What are BIA's responsibilities in approving leases?**

(a) We will work to provide assistance to Indian landowners in leasing their land, either through negotiations or advertisement.

(b) We will promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction, including through contracts and self-governance compacts entered into under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f et. seq.

(c) We will promptly respond to requests for BIA approval of leases, as specified in § 162.339, §162.439, § 162.529, and §162.564.

(d) We will work to ensure that the use of the land is consistent with the Indian landowners' wishes.

**§ 162.019 What are BIA's responsibilities in administering and enforcing leases?**

(a) Upon notification from the Indian landowner that the lessee has failed to comply with the terms and conditions of the lease, we will promptly take appropriate action, as specified in § 162.362, § 162.462, and § 162.587.

(b) We will promptly respond to requests for BIA approval of amendments, assignments, leasehold mortgages, and subleases, as specified in subparts B, C, D, and E.

(c) We will respond to Indian landowners' concerns regarding the management of their land.

(d) We will take emergency action as needed to preserve the value of the land.

**§ 162.020 What may BIA do if an individual or entity takes possession of or uses Indian land without an approved lease or other proper authorization?**

If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized possession or use is a trespass. We may take action to recover possession on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowner may pursue any available remedies under tribal law.

**§ 162.021 May BIA take emergency action if Indian land is threatened?**

(a) We may take appropriate emergency action if there is a natural disaster or if an individual or entity causes or threatens to cause immediate and significant harm to Indian land. Emergency action may include judicial action seeking immediate cessation of the activity resulting in or threatening the harm.



(b) We will make reasonable efforts to notify the Indian landowners before and after taking emergency action. In all cases, we will notify the Indian landowners after taking emergency action by constructive notice.

**§ 162.022 May decisions under this part be appealed?**

Appeals from BIA decisions under this part may be taken pursuant to part 2 of this chapter, except where otherwise provided in this part. For purposes of appeals from BIA decisions under this part, “interested party” is defined as any person whose own direct economic interest is adversely affected by an action or decision.

**§ 162.023 Who may I contact with questions concerning the leasing process?**

The Indian landowner or prospective lessee may contact the local BIA realty office with jurisdiction over the land for answers to questions about the leasing process.

**§ 162.024 What documentation may BIA require in approving, administering, and enforcing leases?**

(a) We may require that the parties provide any pertinent environmental and technical records, reports, and other information (e.g., records of lease payments), related to approval, administration, and enforcement of leases.

(b) We will adopt environmental assessments and environmental impact statements prepared by another Federal agency, entity, or person under 43 C.F.R. § 46.320 and 42 C.F.R. § 1506.3, but may require a supplement. We shall use any reasonable evidence that another Federal agency has accepted the environmental report, including but not limited to, letters of approval or acceptance.

(c) Upon our request, the parties must make appropriate records, reports, or information available for our inspection and duplication. We will keep confidential any

such information that is marked confidential or proprietary and is exempt from public release, to the extent allowed by law. Failure to cooperate with such request, provide data, or grant access to information or records, may, at our discretion, be treated as a lease violation. All approved leases must include such disclosure provisions.

5. In § 162.101, revise the section heading and the introductory language to read as follows:

**§ 162.101 What key terms do I need to know for this subpart?**

For the purposes of this subpart:

\* \* \*

6. Remove § 162.102 – § 162.104.

7. In § 162.105 and § 162.106, remove the word “lease” and add in its place the words “agricultural lease” and remove the word “leasing” and add in its place the words “agricultural leasing” wherever they appear.

8. In § 162.107, revise the section heading and the introductory language in paragraph (a) to read as follows:

**§ 162.107 What are BIA’s objectives in granting and approving agricultural leases?**

(a) We will assist Indian landowners in leasing their land for agricultural purposes. For the purposes of §§ 162.102 through 162.256:

\* \* \*

9. In § 162.108 – § 162.110 remove the word “lease” wherever it appears and add in its place the words “agricultural lease”.

10. In § 162.111, revise the section heading, the introductory language in paragraph (a), and paragraph (b) to read as follows:

**§ 162.111 Who owns the records associated with this subpart?**

(a) Records associated with this subpart are the property of the United States if they:

\* \* \*

(b) Records associated with this subpart not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this subpart are the property of the tribe.

11. Revise the heading of § 162.112 to read as follows:

**§ 162.112 How must records associated with this part be preserved?**

12. In § 162.113 remove the word “part” wherever it appears and add in its place the word “subpart”.

13. Add new subparts C through D to read as follows:

**Subpart C—Residential Leases**

*Residential Leasing General Provisions*

Sec.

162.301 What types of leases does this subpart cover?

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## **Subpart C—Residential Leases**

### *Residential Leasing General Provisions*

#### **§ 162.301 What types of leases does this subpart cover?**

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the improvements thereon) on Indian land, for housing purposes. Leases covered by this subpart would authorize the construction or use of:

- (1) A single-family residence; and
- (2) Housing for public purposes.

(b) Leases for other residential development (for example, single-family residential developments that are not housing for public purposes and multi-family developments) are covered under subpart D of this part.

**§ 162.302 Is there a model residential lease form?**

We will make available one or more model lease forms that satisfy the formal requirements of this part, including, as appropriate, the model tribal lease form jointly developed by BIA, the Department of Housing and Urban Development, the Department of Veterans' Affairs, and the Department of Agriculture. Use of a model lease form is not mandatory, provided all requirements of this part are met. If a model lease form is not used, we will assist the Indian landowners in drafting lease provisions or in using tribal lease forms that conform to the requirements of this part.

*Lease Requirements*

**§ 162.311 How long may the term of a residential lease run?**

(a) A residential lease must provide for a definite lease term, state if there is an option to renew and, if so, provide for a definite term for the renewal period.

(b) Unless otherwise provided by paragraphs (b)(1) or (b)(2) of this section, the maximum term may not exceed 50 years. The lease may provide for a primary term of



less than 50 years with a provision for one or more renewals, so long as the maximum term, including all renewals, does not exceed 50 years.

(1) If a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), the lease may provide for a primary term, and one renewal not to exceed 25 years, so long as the maximum term, including the renewal, does not exceed the maximum term established by statute.

(2) Where all of the trust or restricted interests in a tract are owned by a deceased Indian whose heirs and devisees have not yet been determined, the maximum term may not exceed two years.

(c) A residential lease may not be extended by holdover.

**§ 162.312 What must the lease include if it contains an option to renew?**

(a) If the lease provides for an option to renew, the lease must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us;

(3) Whether landowner consent to the renewal is required;

(4) That the lessee must provide notice to the Indian landowner and any mortgagees of the renewal;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the commencement of the renewal term;

(6) That any change in the terms of the lease will be considered an amendment subject to consent and BIA approval requirements pursuant to §§ 162.343 through 162.346; and

(7) Any other conditions for renewal (e.g., the lessee may not be in violation of the lease at the time of renewal).

(b) We must record any renewal of a lease in the Land Titles and Records Office.

**§ 162.313 Are there mandatory provisions that a residential lease must contain?**

(a) All residential leases must identify:

(1) The tract or parcel of land being leased;

(2) The purpose of the lease and authorized uses of the leased premises;

(3) The parties to the lease;

(4) The term of the lease;

(5) The owner being represented and the authority under which such action is being taken, where one executes a lease in a representative capacity;

(6) The citation of the statute that authorizes our approval;

(7) Who is responsible for constructing, owning, operating, maintaining, and managing improvements;

(8) Payment requirements and late payment charges, including interest;

(9) Insurance requirements under § 162.337; and

(10) Bonding requirements under § 162.334. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities.

(b) All residential leases must include the following provisions:

(1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(2) Nothing in the lease would prevent or delay termination of Federal trust responsibilities for the land during the lease's term;

(3) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;

(4) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.013;

(5) The lessee indemnifies and holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(6) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, unless the liability or cost arises from the gross negligence or willful misconduct of the Indian landowner (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(7) In the event that historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe that has jurisdiction to determine how to proceed and appropriate disposition;

(8) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, to enter upon the leased premises for inspection and compliance; and

(9) Unless otherwise indicated, this is a lease of the trust and restricted interests in the property described and is not a lease of any undivided fee interests. All rental payments by the lessee will be distributed to the trust and restricted landowners and life estate holders on trust and restricted land only. The lessee will be responsible for accounting to the owners of any fee interests that may exist in the property being leased.

(c) We may treat any provision of a lease, sublease, amendment, assignment, or leasehold mortgage that is in violation of Federal law as a violation of the lease.

**§ 162.314 May improvements be made under a residential lease?**

(a) The lessee may construct improvements under a residential lease if the residential lease authorizes the construction and generally describes the type and location of the improvements to be constructed during the lease term.

(b) The lessee must provide reasonable notice to the Indian landowners of the construction of any major improvements not generally described in the lease. We will treat any attempt by the lessee to construct major improvements, without the necessary notice, as a lease violation.

**§ 162.315 How must a residential lease address ownership of improvements?**

(a) A residential lease must specify who will own any improvements the lessee constructs during the lease term. In addition, the lease must indicate whether each specific improvement the lessee constructs will, upon the expiration or termination of the lease:

(1) Remain on the leased premises, in a condition satisfactory to the Indian landowners and become the property of the Indian landowner;

(2) Be removed immediately or within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as close as possible to their condition before construction of such improvements; or

(3) Be disposed of by other means.

(b) A lease that requires the lessee to remove the improvements must also provide the Indian landowners with an option to take possession of and title to the improvements if the improvements are not removed within the specified time period.

(c) Any permanent improvements on the leased land shall be subject to 25 CFR 1.4 and, in addition, shall not be subject to any fee, tax, assessment, levy, or other such charge imposed by any State or political subdivision of a State, without regard to ownership of those improvements. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

#### **§ 162.316 How will BIA enforce removal requirements in a residential lease?**

We may take appropriate enforcement action in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, to ensure removal of the improvements or restoration of the premises at the lessee's expense. We may take such enforcement action after termination or expiration of the lease. We may collect and hold the performance bond until removal and restoration are completed.

#### **§ 162.317 How must a residential lease describe the land?**

(a) A residential lease must describe the leased premises by reference to a public or private survey, if possible. If the land cannot be so described, the lease must include a legal description or other description that is sufficient to identify the leased premises, subject to our approval.

(b) If the tract is fractionated, we will describe the undivided trust or restricted interest in the leased premises.

#### *Rental Requirements*

#### **§ 162.320 How much rent must be paid under a residential lease?**

(a) A residential lease of tribal land may allow for any payment amount negotiated by the tribe, if the tribe submits a signed certification stating that it has determined the negotiated amount to be in its best interest. The tribe may request, in writing, that we require fair market rental, in which case we will determine fair market rental in accordance with § 162.322 and will approve the lease only if it requires payment of not less than fair market rental. Unless the tribe makes such a request, BIA will not require a valuation or appraisal or determine fair market rental, but instead will defer to the tribe's determination that the negotiated compensation is in its best interest.

(b) A residential lease of individually owned Indian land must require payment of not less than fair market rental except that we may approve a lease of individually owned Indian land that provides for the payment of nominal rent, or less than a fair market rental, if:

(1) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(2) We determine it is in the Indian landowners' best interest, based on factors including but not limited to:

(i) The lessee is a member of the Indian landowner's immediate family as defined in § 162.003;

(ii) The lessee is a co-owner of the leased tract; or

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease.

(c) Where the owners of the applicable percentage of interests consent to a residential lease on behalf of all the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners and those on whose behalf we have consented receive fair market rental.

**§ 162.321 Will BIA require a valuation to determine fair market rental for a residential lease?**

(a) We will not require valuations for negotiated residential leases of tribal land, or of any undivided tribal interest in a fractionated tract, if the tribe submits a signed certification. The tribe may request, in writing, that we require a valuation, in which case we will determine fair market rental in accordance with § 162.322.

(b) We will require valuations for individually owned Indian land, except that we may waive the valuation requirement when:

(1) 100 percent of the Indian landowners submit to us a written request to waive the valuation requirement; and

(2) We determine that the waiver is in the best interest of the Indian landowners, taking into consideration the landowners' written request.

(c) We have 30 days from receipt of the waiver request in paragraph (b) of this section to make a determination. Our determination whether to approve the request will be in writing and will state the basis for our approval or disapproval. If we fail to meet the 30-day deadline, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

**§ 162.322 What type of valuation may be used to determine fair market rental for a residential lease?**

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental for residential leases of individually owned Indian land, or at the request of the tribe for tribal land.

(b) We will either:

(1) Prepare a market analysis, appraisal, or other appropriate valuation method;

or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowner or lessee.

(c) We will approve a market analysis, appraisal, or other appropriate valuation method for use only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214; and

(2) Complies with Department policies.

**§ 162.323 When are rental payments due under a residential lease?**

(a) A residential lease must specify the dates on which all payments are due.



(b) Unless otherwise provided in the lease, payments may not be made or accepted more than one year in advance of the due date.

**§ 162.324 Must a residential lease specify to whom rental payments may be made?**

(a) A residential lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners whose trust accounts are unencumbered when there are 10 or fewer beneficial owners and 100 percent of the beneficial owners agree to receive payment from the lessee at the commencement of the lease.

(1) If the lease provides that the lessee will directly pay the Indian landowners, the lease must include provisions for proof of payment.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us.

(3) The lessee must send direct payments to the parties and addresses specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless otherwise provided in the lease, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except if:

(i) 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement, then the lessee must make all Indian landowners' payments to us; or

(ii) If any individual Indian landowner dies, is declared non compos mentis, becomes whereabouts unknown, or owes a debt resulting in a trust account encumbrance, then the lessee must make that individual Indian landowner's payment to us.

**§ 162.325 What form of payment may be accepted under a residential lease?**

(a) When payments are made directly to Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) When payments are made to us, we will accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks;

(4) Cashier's checks; or

(5) Electronic funds transfer payments.

(c) We will not accept cash, foreign currency, or third-party checks, except that we will accept third-party checks from financial institutions or Federal agencies.

(d) The preferred method of payment is electronic funds transfer payments.

**§ 162.326 May a residential lease provide for non-monetary or varying types of compensation?**

(a) With our approval, the lease may provide for:

(1) Alternative forms of rental, including, but not limited to in-kind consideration; or

(2) Varying types of compensation at specific stages during the life of the lease.

(b) For individually owned land, we will approve alternative forms of rental and varying types of compensation if we determine that it is in the best interest of the Indian

landowners. For tribal land, we will defer to the tribe's determination that the alternative forms of rental and varying types of consideration are in its best interest, if the tribe submits a signed certification stating that it has determined the alternative forms of rental and varying types of consideration to be in its best interest.

**§ 162.327 Will BIA notify a lessee when a payment is due under a residential lease?**

Upon request of the Indian landowner, we may issue invoices to a lessee in advance of the dates on which payments are due under a residential lease, but the lessee's obligation to make such payments in a timely manner will not be excused if such invoices are not issued, delivered, or received.

**§ 162.328 Must a residential lease provide for rental reviews or adjustments?**

(a) For a residential lease with a term of five years or less, the parties may agree in the lease to provide for periodic reviews of the adequacy of rent in the lease. For a residential lease with a term of more than five years, a review of the adequacy of rent must occur at least every fifth year, in the manner specified in the lease, unless the conditions in paragraph (b) of this section are met. The lease must specify:

- (1) When adjustments take effect;
- (2) Who is authorized to make adjustments;
- (3) What the adjustments are based on; and
- (4) How to resolve disputes arising from the adjustments.

(b) A review of the adequacy of rent is not required if:

- (1) The lease provides for automatic rental adjustments; or
- (2) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to,

where the lease provides for payment of less than fair market rental or the lease provides for most or all rent to be paid during the first five years of the lease term or prior to the date the review would be conducted.

(c) When a review results in the need for adjustment of rent, we must approve the adjustment and Indian landowners must consent to the adjustment in accordance with § 162.011, unless otherwise provided in the lease.

**§ 162.329 What other types of payments are required under a residential lease?**

(a) The lessee may be required to pay additional fees, taxes, and/or assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.315(c). The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. Failure to make such payments will be treated as a violation of the lease.

*Bonding and Insurance*

**§ 162.334 Must a lessee or assignee provide a performance bond for a residential lease?**

(a) Except for leases for housing for public purposes or as provided in (f), the lessee must provide a performance bond in an amount sufficient to secure the contractual obligations including:

(1) No less than the highest annual rental specified in the lease, if the rent is paid annually, or other amount established by BIA in consultation with the tribe for tribal land

or, where feasible, with Indian landowners for individually owned Indian land, if the rent is to be paid on a non-annual schedule;

(2) The operation and maintenance charges for any land located within an irrigation project; and

(3) As appropriate, the restoration and reclamation of the leased premises to their condition at the commencement of the lease term or some other specified condition.

(b) The performance bond must be deposited with us and made payable only to us, and may not be modified without our approval.

(c) The lease must provide that we may adjust security or performance bond requirements at any time to reflect changing conditions.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The surety must provide notice to us at least 60 days before canceling a performance bond so that we may notify the lessee of its obligation to provide a substitute performance bond. Failure to provide a substitute performance bond will be a violation of the lease.

(f) We may waive the requirement for a performance bond upon the request of the Indian landowner, if the waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal rent. We may revoke the waiver and require a performance bond at any time if the waiver is no longer in the best interest of the Indian landowner.

**§ 162.335 What forms of performance bonds may be accepted under a residential**

**lease?**

(a) We will only accept a performance bond in one of the following forms:

(1) Cashiers' checks;

(2) Certificates of deposit issued by a federally insured financial institution

authorized to do business in the United States;

(3) Irrevocable letters of credit issued by a federally insured financial institution

authorized to do business in the United States;

(4) Negotiable Treasury securities; or

(5) Surety bond issued by a company approved by the U.S. Department of the

Treasury.

(b) All forms of performance bonds must:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an

immediate claim upon or sell them if lessee violates the lease;

(3) Be irrevocable during the term of the performance bond; and

(4) Be automatically renewable during the term of the lease.

**§ 162.336 What is the bond release process under a residential lease?**

(a) Upon expiration, termination, or cancellation of the lease, the lessee must

submit a written request for a performance bond release to BIA.

(b) Upon receipt of a request under paragraph (a) of this section, BIA will confirm

with the tribe, for tribal land or, where feasible, with the Indian landowners for

individually owned Indian land, that the lessee has complied with all lease obligations,

then release the performance bond to the lessee unless we determine that the bond must be redeemed to fulfill the contractual obligations.

**§ 162.337 Must a lessee provide insurance for a residential lease?**

Except as provided in paragraph (c) of this section, a lessee must provide insurance necessary to protect the interests of the Indian landowners and in an amount sufficient to protect all insurable improvements on the premises.

(a) The insurance may include property, liability and/or casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. We may revoke the waiver and require insurance at any time if the waiver is no longer in the best interest of the Indian landowner.

*Approval*

**§ 162.338 What documents must the parties submit to obtain BIA approval of a residential lease?**

A lessee or the Indian landowner must submit the following documents to us to obtain BIA approval of a residential lease:

(a) A lease executed by the Indian landowner and the lessee that complies with the requirements of this part;

(b) A valuation, if required under § 162.321;

(c) Organizational documents, certificates, filing records, and resolutions or other authorization documents, including evidence of the representative's authority to execute a lease, if the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, to show that the lease will be enforceable and that the legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;

(d) A performance bond, where required;

(e) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law;

(f) Reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal land use requirements;

(g) A preliminary site plan identifying the proposed location of residential development, roads and utilities, if applicable;

(h) Information to assist us in our evaluation of the factors in 25 U.S.C. 415(a);

(i) Information to facilitate BIA's analysis under applicable environmental and cultural resources laws; and

(j) Any additional documentation we determine to be reasonably necessary for approval.

#### **§ 162.339 What is the approval process for a residential lease?**

(a) Before we approve a residential lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Ensure compliance with all applicable laws and ordinances;



(3) Assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a);

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements; and

(5) If the lease is a negotiated lease, defer to the Indian landowners' determination that the lease is in their best interest, to the maximum extent possible.

(b) When we receive a residential lease proposal and all of the supporting documents that conform to this part, we will, within 30 days of receiving the documents at the appropriate BIA office, approve, disapprove, return the submission for revision, or notify the parties in writing that we need additional time to review the lease. Our letter notifying the parties that we need additional time to review the lease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the lease.

(c) If we fail to meet the deadlines in this section, then the parties may take appropriate action under part 2 of this chapter.

(d) We will make any lease approval or disapproval determination and the basis for the determination, along with notification of appeal rights under part 2 of this chapter, in writing and will send the determination and notification to the parties to the lease.

(e) Any residential lease issued under the authority of the Native American Housing Assistance and Self-Determination Act, 25 U.S.C 4211(a), whether on tribal land or on individually owned Indian land, must be approved by us and by the affected tribe.

(f) We will provide approved residential leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved residential leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

**§ 162.340 When will a residential lease be effective?**

(a) A residential lease will be effective on the date that we approve the lease, notwithstanding any appeal that may be filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

**§ 162.341 Must residential lease documents be recorded?**

(a) A residential lease, amendment, assignment, leasehold mortgage, and sublease must be recorded in our Land Titles and Records Office with jurisdiction over the leased land.

(1) We will record the lease or other document immediately following our approval.

(2) When our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the Land Title and Records Office with jurisdiction over the leased land.

(b) The tribe must record the following leases in the Land Titles and Records Office with jurisdiction over the leased lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval under certain conditions.

**§ 162.342 What action may BIA take if a residential lease disapproval decision is appealed?**

(a) If a party appeals our decision to disapprove a lease, assignment, amendment, sublease, or leasehold mortgage, then the official to whom the appeal is made may require the lessee to post an appeal bond in an amount necessary to protect the Indian landowners against financial losses and damage to trust resources likely to result from the delay caused by an appeal. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

*Amendments*

**§ 162.343 May the parties amend a residential lease?**

(a) The parties may amend a residential lease by obtaining:

(1) The lessee's signature;

(2) The Indian landowners' consent pursuant to the requirements contained in § 162.344; and

(3) BIA approval of the amendment under § 162.345 and § 162.346.

(b) The parties may not amend a residential lease if the lease expressly prohibits amendments.

**§ 162.344 What are the consent requirements for an amendment of a residential lease?**

(a) The Indian landowners, or their representatives under § 162.012, must consent to an amendment of a residential lease in the same percentages and manner as a new residential lease under § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) of this section are met.

(1) The approved residential lease establishes that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment after a specified period of time following Indian landowners' receipt of the amendment. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed amendment or other documentation of the Indian landowners' consent; proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and any other pertinent information to us for review.

(2) The approved residential lease authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consent to an amendment.

(b) Unless specifically authorized in the lease, the written power of attorney, or court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

- (1) Reduce the payment obligations or terms to the Indian landowners;
- (2) Increase or decrease the lease area; or

(3) Terminate or change the term of the lease.

**§ 162.345 What is the approval process for an amendment of a residential lease?**

We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to make a determination whether to approve the amendment or notify the parties in writing that we need additional time to review the amendment.

(a) Our letter notifying the parties that we need additional time to review the amendment must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the amendment.

(b) If we fail to send either a determination or notification within 30 days from receipt of the required documents or 30 days from sending the notification, the amendment is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for amendments that are deemed approved.

(c) Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

**§ 162.346 How will BIA decide whether to approve an amendment of a residential lease?**

(a) We may only disapprove a residential lease amendment if:

(1) The required consents have not been obtained from the parties to the lease and any mortgagees or sureties;

(2) The lessee is in violation of the lease; or

(3) We find a compelling reason to withhold our approval in order to protect the

best interests of the Indian landowners.

- (b) We may not unreasonably withhold approval of an amendment.

#### *Assignments*

#### **§ 162.347 May a lessee assign a residential lease?**

A lessee may assign a residential lease by meeting the consent requirements in § 162.348 and obtaining our approval of the assignment under § 162.349 and § 162.350, unless the lease expressly prohibits assignments.

#### **§162.348 What are the consent requirements for an assignment of a residential lease?**

(a) The Indian landowners, or their representatives under § 162.012, must consent to an assignment of a residential lease in the same percentages and manner as a new residential lease under § 162.011, unless the requirements in paragraphs (a)(1), (a)(2), or (a)(3) of this section are met.

(1) The assignee agrees in writing to assume all of the lessee's obligations under the lease, including bonding requirements, and:

(i) The lease provides for assignments without further consent of the Indian landowners or with consent in specified percentages and manner; or

(ii) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance.

(2) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment after a specified period of time following landowners' receipt of the assignment. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed

assignment or other documentation of the Indian landowners' consent; proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(3) The lease authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an assignment.

(b) The lessee must obtain the consent of the holders or any bonds or mortgages.

**§ 162.349 What is the approval process for an assignment of a residential lease?**

(a) The lessee may assign the lease without our approval if:

(1) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.013.

(b) We have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to make a determination whether to approve the assignment or notify the parties that we need additional information. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(c) If we fail to meet the deadline in this section, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

**§ 162.350 How will BIA decide whether to approve an assignment of a residential**

**lease?**

(a) We may only disapprove an assignment of a residential lease if:

- (1) The Indian landowners have not consented, and their consent is required;
- (2) The lessee's mortgagees or sureties have not consented;
- (3) The lessee is in violation of the lease;
- (4) The assignee does not agree to be bound by the terms of the lease;
- (5) The proposed use by the assignee will require an amendment to the lease; or
- (6) We find a compelling reason to withhold our approval in order to protect the

best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether:

(1) The value of any part of the leased premises not covered by the assignment would be adversely affected; and

(2) If a performance bond is required, the assignee has bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable against the assignee, and that the assignee will be able to perform its obligations under the lease or assignment.

(c) If the lease was approved at less than fair market rental and the assignee is not a co-owner or member of the Indian landowners' immediate family, the assignment must provide for the assignee to pay fair market rental to the Indian landowner.

(d) We may not unreasonably withhold approval of an assignment.

*Subleases*

**§ 162.351 May a lessee sublease a residential lease?**



(a) A lessee may sublease a residential lease by meeting the consent requirements in § 162.352 and obtaining our approval of the sublease under § 162.353 and § 162.354, or by meeting the conditions in paragraph (b) of this section, unless the lease expressly prohibits subleases.

(b) Where the sublease is part of a housing development for public purposes, the lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, as long as:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) We have approved a general plan for the development; and

(3) We have approved a sublease form and general rent schedule for use in the project.

**§ 162.352 What are the consent requirements for a sublease of a residential lease?**

(a) The Indian landowners must consent to a sublease of a residential lease in the same percentages and manner as a new residential lease pursuant to § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) of this section are met.

(1) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease after a specified period of time following landowners' receipt of the sublease. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed sublease or other documentation of the landowners' consent; proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(2) The lease authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a sublease.

(b) The lessee must obtain the consent of any sureties.

**§ 162.353 What is the approval process for a sublease of a residential lease?**

We have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to make a determination whether to approve the sublease or notify the parties in writing that we need additional time to review the sublease.

(a) Our letter notifying the parties that we need additional time to review the sublease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(b) If we fail to send either a determination or notification within 30 days from receipt of required documents or from sending the notification, the sublease is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for subleases that are deemed approved.

**§ 162.354 How will BIA decide whether to approve a sublease of a residential lease?**

(a) We may only disapprove a sublease of a residential lease if:

- (1) The Indian landowners have not consented, and their consent is required;
- (2) The lessee's mortgagees or sureties have not consented;
- (3) The lessee is in violation of the lease;

(4) The lessee will not remain liable under the lease;

(5) The sublessee does not agree to be bound by the terms of the lease;

(6) The proposed use by the sublessee will require an amendment of the lease; or

(7) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(7) of this section, we will consider whether:

(1) The value of any part of the leased premises not covered by the sublease would be adversely affected; and

(2) If a performance bond is required by the sublease, the sublessee has bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable against the sublessee, and that the sublessee will be able to perform its obligations under the lease or sublease.

(c) If the lease was approved at less than fair market rental, and the sublessee is not a co-owner or a member of the Indian landowner's immediate family, the sublease must provide for the sublessee to pay fair market rental to the Indian landowner.

(d) We may not unreasonably withhold approval of a sublease.

#### *Leasehold Mortgages*

#### **§ 162.355 May a lessee mortgage a residential lease?**

A lessee may mortgage a residential lease by meeting the consent requirements in § 162.356 and obtaining BIA approval of the leasehold mortgage under in § 162.357 and § 162.358, unless the lease expressly prohibits leasehold mortgages.

**§ 162.356 What are the consent requirements for a leasehold mortgage of a residential lease?**

The Indian landowners, or their representatives under § 162.012, must consent to a leasehold mortgage under a residential lease in the same percentages and manner as a new residential lease under § 162.011, unless the requirements in paragraphs (a), (b), or (c) of this section are met.

(a) The lease contains a general authorization for a leasehold mortgage and states what law would apply in case of foreclosure.

(b) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage after a specified period of time following landowners' receipt of the leasehold mortgage. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed leasehold mortgage or other documentation of the Indian landowners' consent; proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(c) The lease authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

**§ 162.357 What is the approval process for a leasehold mortgage of a residential lease?**

(a) We have 30 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to make a determination whether to approve the leasehold mortgage or notify the parties that we need additional information.

Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we fail to meet the deadline in this section, the lessee may take appropriate action under part 2 of this chapter.

**§ 162.358 How will BIA decide whether to approve a leasehold mortgage of a residential lease?**

(a) We may only disapprove the leasehold mortgage if:

(1) The Indian landowners have not consented, and their consent is required;

(2) The holders of lessee's bond have not consented; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(3) of this section, we will consider whether:

(1) The lessee's ability to comply with the lease would be adversely affected by any new loan obligations;

(2) Any lease provisions would require modification to be consistent with the mortgage;

(3) The remedies available to us or to Indian landowners would be limited (beyond any additional notice and cure rights to be afforded to the mortgagee) in the event of a lease violation; and

(4) Any rights of the Indian landowners would be subordinated or adversely affected in the event of a loan default by the lessee.

(c) We may not unreasonably withhold approval of a leasehold mortgage.

*Effectiveness, Compliance, and Enforcement*

**§ 162.359 When will an amendment, assignment, sublease, or leasehold mortgage under a residential lease be effective?**

(a) An amendment, assignment, sublease, or leasehold mortgage under a residential lease will be effective upon our approval, notwithstanding any appeal that may be filed under part 2 of this chapter, unless approval is not required under § 162.008(b), § 162.349(a), or § 162.351(b), or the conditions in paragraph (b) of this section apply. We will provide copies of approved documents to the party requesting approval, and upon request, to other parties to the agreement.

(b) If the amendment or sublease was deemed approved pursuant to § 162.345(b) or § 162.353(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review.

(c) An assignment or sublease that does not require landowner consent or BIA approval shall be effective upon execution by the parties.

**§ 162.360 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage?**

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a residential lease, we will notify the parties immediately and advise them of their right to appeal the decision under part 2 of this chapter.

**§ 162.361 May BIA investigate compliance with a residential lease?**

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, to protect the interests of the Indian landowners and ensure that the lessee is in compliance with the requirements of the lease.

(b) If the Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

**§ 162.362 May a residential lease provide for negotiated remedies in the event of a violation?**

(a) A residential lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides the parties with the power to terminate the lease, BIA approval of the termination is not required and the termination is effective without BIA cancellation. The parties must notify us of the termination so that we may record it in the Land Titles and Records Office.

(b) A residential lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the applicable percentage of interests under § 162.011 of this part. If the lease provides the parties with the power to terminate the lease, BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented. BIA will record the termination in the Land Titles and Records Office.

(c) The parties must notify any surety or mortgagee of a termination of a residential lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease.

(e) A residential lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, by a tribal governing body in the absence of

a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

**162.363 What will BIA do about a violation of a residential lease?**

(a) If we determine there has been a violation of the conditions of a residential lease other than a violation of payment provisions covered by paragraph (b) of this section, we will promptly send the lessee and its sureties and any mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) Within 10 business days of the receipt of a notice of violation, the lessee must:

- (i) Cure the violation and notify us in writing that the violation has been cured;
- (ii) Dispute our determination that a violation has occurred; or
- (iii) Request additional time to cure the violation.

(3) If a violation is determined to have occurred, we will make a reasonable attempt to notify the Indian landowners.

(4) We may order the lessee to stop work.

(b) A lessee's failure to pay rent in the time and manner required by a residential lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessees and its sureties a notice of violation by certified mail, return receipt requested:



(i) Promptly following the date on which the payment was due, if the lease requires that rental payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(3) The lessee must provide adequate proof of payment as required in the notice of violation.

(c) The lessee and its sureties will continue to be responsible for the obligations contained in the lease until the lease is terminated, cancelled, or expires.

**§ 162.364 What will BIA do if the lessee does not cure a violation of a residential lease on time?**

(a) If the lessee does not cure a violation of a residential lease within the requisite time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

(2) The Indian landowners wish to invoke any remedies available to them under the lease;

(3) We should invoke other remedies available under the lease or applicable law, including, collection on any available performance bond or, for failure to pay rent, referral of the debt to the Department of the Treasury for collection; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) We may take action to recover unpaid rent and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid rent.

(2) We may still take action to recover any unpaid rent if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and its sureties and any mortgagees a cancellation letter by certified mail, return receipt requested within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid rent or late payment charges due under the lease;

(3) Notify the lessee of their right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the lessee to post an appeal bond;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Require any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowner may pursue any available remedies under tribal law.

**§ 162.365 Will late payment charges or special fees apply to delinquent payments due under a residential lease?**

(a) Late payment charges will apply as specified in the lease. The failure to pay such amounts will be treated as a lease violation.

(b) The following special fees may be assessed to cover administrative costs incurred by the United States in the collection of the debt, if rent is not paid in the time and manner required, in addition to late payment charges that must be paid to the Indian landowners under the lease:

<b>The lessee will pay...</b>	<b>For...</b>
(a) \$50.00	Dishonored checks.
(b) \$15.00	Processing of each notice or demand letter.
(c) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

**§ 162.366 How will payment rights relating to a residential lease be allocated between the Indian landowners and the lessee?**

The residential lease may allocate rights to payment for insurance proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the insurance policy, order, award, judgment, or other document including the lease, the Indian landowners will be entitled to receive such payments.

**§ 162.367 When will a cancellation of a residential lease be effective?**

(a) A cancellation involving a residential lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will be stayed if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is stayed, the lessee must continue to pay rent and comply with the other terms of the lease.

**§ 162.368 What will BIA do if a lessee remains in possession after a residential lease expires or is cancelled?**

If a lessee remains in possession after the expiration or cancellation of a residential lease, we may treat the unauthorized possession as a trespass under applicable law. Unless the applicable percentage of Indian landowners under § 162.011 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as forcible entry and detainer action.

**§ 162.369 Will BIA regulations concerning appeal bonds apply to cancellation decisions involving residential leases?**

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions.

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond

decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**§ 162.370 When will BIA issue a decision on an appeal from a residential leasing decision?**

BIA will issue a decision on an appeal from a leasing decision within 30 days of receipt of all pleadings.

**§ 162.371 What happens if the lessee abandons the leased premises?**

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

**Subpart D—Business Leases**

*Business Leasing General Provisions*

**§ 162.401 What types of leases does this subpart cover?**

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the improvements thereon) on Indian land, including:

- (1) Leases for residential purposes that are not covered in subpart C;
- (2) Leases for business purposes that are not covered in subpart E;
- (3) Leases for religious, educational, recreational, cultural, or other public purposes; and
- (4) Commercial or industrial leases for retail, office, manufacturing, storage, biomass, waste-to-energy, or other business purposes.

(b) Leases covered by this subpart may authorize the construction of single-purpose or mixed use projects designed for use by any number of lessees or occupants.

## **§ 162.402 Is there a model business lease form?**

There is no model business lease because of the need for flexibility in negotiating and writing business leases; however, we may provide other guidance, such as checklists and sample lease provisions to assist in the lease negotiation process. Additionally, we may assist the Indian landowners, upon their request, in developing appropriate lease provisions or in using tribal lease forms that conform to the requirements of this part.

### *Lease Requirements*

## **§ 162.411 How long may the term of a business lease run?**

(a) A business lease must provide for a definite term, state if there is an option to renew and, if so, provide for a definite term for the renewal period. Unless authorized by paragraph (b), a business lease may have an initial term not to exceed 25 year and one renewal period not to exceed 25 years.

(b) If a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), the lease may provide for a primary term, and one renewal not to exceed 25 years, so long as the maximum term, including the renewal, does not exceed the maximum term established by statute.

(c) The lease term, including any renewal, must be reasonable, given the:

- (1) Purpose of the lease;
- (2) Type of financing; and
- (3) Level of investment.

(d) Where all of the trust or restricted interests in a tract are owned by a deceased Indian whose heirs and devisees have not yet been determined, the maximum term may not exceed two years.

- (e) The lease may not be extended by holdover.

**§ 162.412 What must the lease include if it contains an option to renew?**

- (a) If the lease provides for an option to renew, the lease must specify:

- (1) The time and manner in which the option must be exercised or is automatically effective;

- (2) That confirmation of the renewal will be submitted to us;

- (3) Whether Indian landowner consent to the renewal is required;

- (4) That the lessee must provide notice to the Indian landowner and any mortgagees of the renewal;

- (5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the commencement of the renewal term;

- (6) That any change in the terms of the lease will be considered an amendment subject to consent and BIA approval requirements pursuant to § 162.444; and

- (7) Any other conditions for renewal (e.g., the lessee may not be in violation of the lease at the time of renewal).

- (b) We must record any renewal of a lease in the Land Title and Records Office.

**§ 162.413 Are there mandatory provisions that a business lease must contain?**

- (a) All business leases must identify:

- (1) The tract or parcel of land being leased;

- (2) The purpose of the lease and authorized uses of the leased premises;

- (3) The parties to the lease;

- (4) The term of the lease;

- (5) The owner being represented and the authority under which such action is being taken, where one executes a lease in a representative capacity;
  - (6) The citation of the statute that authorizes our approval;
  - (7) Who is responsible for constructing, owning, operating, maintaining, and managing improvements pursuant to § 162.415;
  - (8) Payment requirements and late payment charges, including interest;
  - (9) Due diligence requirements under § 162.417 (unless the lease is for religious, educational, recreational, cultural, or other public purposes);
  - (10) Insurance requirements under § 162.437; and
  - (11) Bonding requirements under § 162.434. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities.
- (b) All business leases must include the following provisions:
- (1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;
  - (2) Nothing in the lease would prevent or delay termination of Federal trust responsibilities for the land during the lease's term;
  - (3) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;
  - (4) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.013;
  - (5) The lessee indemnifies and holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or



occupation of the leased premises (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(6) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, unless the liability or cost arises from the gross negligence or willful misconduct of the Indian landowner (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(7) In the event that historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe that has jurisdiction over the land to determine how to proceed and appropriate disposition;

(8) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, to enter upon the leased premises for inspection; and

(9) Unless otherwise indicated, this is a lease of the trust and restricted interests in the property described and is not a lease of any undivided fee interests. All rental payments by the lessee will be distributed to the trust and restricted landowners and life estate holders on trust and restricted land only. The lessee will be responsible for accounting to the owners of any fee interests that may exist in the property being leased.

(c) We may treat any provision of a lease, sublease, amendment, assignment, or leasehold mortgage that is in violation of Federal law as a violation of the lease.

**§ 162.414 May improvements be made under a business lease?**

The lessee may construct improvements under a business lease if the business lease specifies, or provides for the development of:

(a) A plan that describes the type and location of any improvements to be built by the lessee; and

(b) A schedule for construction of the improvements.

**§ 162.415 How must a business lease address ownership of improvements?**

(a) A business lease must specify who will own any improvements the lessee builds during the lease term and may specify that any improvements the lessee builds may be conveyed to the Indian landowners during the lease term. In addition, the lease must indicate whether each specific improvement the lessee builds will, upon the expiration or termination of the lease:

(1) Remain on the leased premises, in a condition satisfactory to the Indian landowners, and become the property of the Indian landowners;

(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as close as possible to their condition before construction of such improvements; or

(3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the improvements must also provide the Indian landowners with an option to take possession of and title to the improvements if the improvements are not removed within the specified time period.

(c) Any permanent improvements on the leased land shall be subject to 25 CFR 1.4 and, in addition, shall not be subject to any fee, tax, assessment, levy, or other such

charge imposed by any State or political subdivision of a State, without regard to ownership of those improvements. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

**§ 162.416 How will BIA enforce removal requirements in a business lease?**

We may take appropriate enforcement action in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, to ensure removal of the improvements or restoration of the premises at the lessee's expense. We may take such enforcement action after termination or expiration of the lease. We may collect and hold the performance bond until removal and restoration are completed.

**§ 162.417 What requirements for due diligence must a business lease include?**

(a) If improvements are to be built, the business lease must include due diligence requirements that require the lessee to complete construction of any improvements within the schedule specified in the lease. The lessee must provide the Indian landowners and BIA good cause as to the nature of any delay, the anticipated date of construction of facilities, and evidence of progress toward commencement of construction, if construction does not occur, or is not expected to be completed, within the time period specified in the lease.

(b) Failure of the lessee to comply with the due diligence requirements of the lease is a violation of the lease and may lead to cancellation of the lease under § 162.464.

(c) BIA may waive the requirements in this section if such waiver is in the best interest of the Indian landowners.

(d) The requirements of this section do not apply to leases for religious, educational, recreational, cultural, or other public purposes.

**§ 162.418 May a business lease allow compatible uses?**

A business lease may provide for the Indian landowner to use, or authorize others to use, the leased premises for other uses compatible with the purpose of the business lease and consistent with the terms of the business lease. Any such use or authorization by the Indian landowner will not reduce or offset the monetary compensation for the business lease.

**§ 162.419 How must a business lease describe the land?**

(a) A business lease must describe the leased premises by reference to an official or certified survey pursuant to § 162.438(j) of this part.

(b) If the tract is fractionated we will describe the undivided trust interest in the leased premises.

*Monetary Compensation Requirements*

**§ 162.420 How much monetary compensation must be paid under a business lease?**

(a) A business lease of tribal land may allow for any payment amount negotiated by the tribe as long as the tribe provides the tribal authorization required by § 162.421(a). The tribe may request, in writing, that we require fair market rental, in which case we will determine fair market rental in accordance with § 162.422 and will approve the lease only if it requires payment of not less than fair market rental. Unless the tribe makes such a request, BIA will not require a valuation or appraisal or determine fair market rental, but instead will defer to the tribe's determination that the negotiated compensation is in its best interest.

(b) A business lease of individually owned Indian land must require payment of not less than fair market rental before any adjustments, based on a fixed amount, a percentage of the projected income, or some other method, unless paragraphs (1) or (2) of this section permit a lesser amount. The lease must establish how the fixed amount, percentage, or combination will be calculated and the frequency at which the payments will be made.

(1) We may approve a lease of individually owned Indian land that provides for the payment of nominal compensation, or less than a fair market rental, if:

(i) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(ii) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(A) The lessee is a member of the individual Indian landowner's immediate family as defined in § 162.003;

(B) The lessee is a co-owner in the leased tract;

(C) A special relationship or circumstances exist that we believe warrant approval of the lease; or

(D) The lease is for religious, educational, recreational, cultural, or other public purposes.

(2) We may approve a lease that provides for payment of less than a fair market rental during the pre-development or construction periods, if we determine it is in the Indian landowners' best interest. The lease must specify the amount of the compensation and the applicable periods.

(3) Where the owners of the applicable percentage of interests under § 162.011 of this part execute a business lease on behalf of all of the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners, and those on whose behalf we have consented, receive a fair market rental.

**§ 162.421 Will BIA require a valuation to determine fair market rental for a business lease?**

(a) We will not require valuations or appraisals for negotiated business leases of tribal land, or of any undivided tribal interest in a fractionated tract, if the tribe submits a tribal authorization expressly stating that it:

- (1) Has negotiated compensation satisfactory to the tribe;
- (2) Waives valuation and appraisal; and
- (3) Has determined that accepting such negotiated compensation and waiving valuation and appraisal is in its best interest.

(b) The tribe may request that BIA require a valuation or appraisal, in which case BIA must determine fair market rental in accordance with § 162.422.

(c) We may only waive the valuation requirement for business leases on individually owned Indian land if:

- (1) The lease is for religious, educational, recreational, cultural, or other public purposes; and
- (2) 100 percent of the Indian landowners submit to us a written request to waive the valuation requirement; and
- (3) We determine that the waiver is in the best interest of the Indian landowners, taking into consideration the landowners' written request.

(d) We have 30 days from receipt of the waiver request in paragraph (c) of this section to make a determination. Our determination whether to approve the request will be in writing and will state the basis for our approval or disapproval. If we fail to meet the 30-day deadline, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

**§ 162.422 What type of valuation may be used to determine fair market rental for a business lease?**

(a) We will use an appraisal to determine the fair market rental before we approve a business lease of individually owned Indian land, or at the request of the tribe for tribal land, unless we approve another type of valuation pursuant to paragraph (d).

(b) We will either:

(1) Prepare an appraisal; or

(2) Use an approved appraisal from the Indian landowner or lessee.

(c) We will approve an appraisal for use only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214; and

(2) Complies with Departmental policies regarding appraisals, including third-party appraisals.

(d) Upon receipt of a tribal authorization, we may use some other type of valuation for a business lease on tribal land, if it conforms to USPAP or a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214.

**§ 162.423 When are monetary compensation payments due under a business lease?**

(a) A business lease must specify the dates on which all payments are due.

(b) Unless otherwise provided in the lease, payments may not be made or accepted more than one year in advance of the due date.

**§ 162.424 Must a business lease specify to whom monetary compensation payments may be made?**

(a) A business lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners whose trust accounts are unencumbered when there are 10 or fewer beneficial owners and 100 percent of the beneficial owners agree to receive payment directly from the lessee.

(1) If the lease provides that the lessee will directly pay the Indian landowners, the lease must also require that the lessee provide us with certification of payment.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us.

(3) The lessee must send direct payments to the parties and addresses specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless otherwise provided in the lease, compensation payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except if:

(i) 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement, then the lessee must make all Indian landowners' payments to us; or



(ii) If any individual Indian landowner dies, is declared non compos mentis, becomes whereabouts unknown, or owes a debt resulting in a trust account encumbrance, then the lessee must make that individual Indian landowner's payment to us.

**§ 162.425 What form of monetary compensation payment may be accepted under a business lease?**

(a) When payments are made directly to Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) When payments are made to us, we will accept:

(1) Money orders;

(2) Certified checks;

(3) Cashier's checks; or

(4) Electronic funds transfer payments.

(c) We will not accept cash, personal checks, foreign currency, or third-party checks except for third-party checks from financial institutions.

(d) The preferred method of payment is electronic funds transfer payments.

**§ 162.426 May the business lease provide for non-monetary or varying types of compensation?**

(a) With our approval, the lease may provide for:

(1) Alternative forms of compensation, including but not limited to payments based on percentage of income or in-kind consideration; or

(2) Varying types of compensation at specific stages during the life of the lease, including but not limited to fixed annual payments during construction and payments based on income during an operational period.

(b) For individually owned land, we will approve alternative forms of compensation and varying types of compensation if we determine that it is in the best interest of the Indian landowners. For tribal land, we will defer to the tribe's determination that the alternative forms of rental and varying types of consideration are in its best interest, if the tribe submits a signed certification stating that it has determined the alternative forms of rental and varying types of consideration to be in its best interest.

**§ 162.427 Will BIA notify a lessee when a payment is due under a business lease?**

Upon request of the Indian landowner, we may issue invoices to a lessee in advance of the dates on which payments are due under a business lease, but the lessee's obligation to make such payments in a timely manner will not be excused if such invoices are not issued, delivered, or received.

**§ 162.428 Must a business lease provide for compensation reviews or adjustments?**

(a) A review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease, unless the conditions in paragraph (b) of this section are met. The lease must specify:

- (1) When adjustments take effect;
  - (2) Who is authorized to make adjustments;
  - (3) What the adjustments are based on; and
  - (4) How disputes arising from the adjustments are resolved.
- (b) A review of the adequacy of compensation is not required if:
- (1) The lease provides for automatic adjustments; or

(2) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(1) The lease provides for payment of less than fair market rental;

(2) The lease is for religious, educational, recreational, cultural, or other public purposes; or

(3) The lease provides for most or all of the compensation to be paid during the first five years of the lease term or prior to the date the review would be conducted.

(c) When a review results in the need for adjustment of compensation, we must approve the adjustment and Indian landowners must consent to the adjustment in accordance with § 162.011, unless otherwise provided in the lease.

**§ 162.429 What other types of payments are required under a business lease?**

(a) The lessee may be required to pay additional fees, taxes, and/or assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.415(c). The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. Failure to make such payments will be treated as a violation of the lease.

(c) Where the property is subject to at least one other lease for another compatible use, the lessees may agree among themselves as to how to allocate payment of the Indian irrigation operation and maintenance charges.

*Bonding and Insurance*

**§ 162.434 Must a lessee provide a performance bond for a business lease?**

(a) Except as provided in paragraph (f) of this section, the lessee must provide a performance bond in an amount sufficient to secure the contractual obligations including:

(1) No less than the highest annual rental specified in the lease, if compensation is paid annually, or other amount established by BIA in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, if the compensation is to be paid on a non-annual schedule;

(2) The construction of any required improvements;

(3) The operation and maintenance charges for any land located within an irrigation project; and

(4) The restoration and reclamation of the leased premises, to their condition at the commencement of the lease term or some other specified condition.

(b) The performance bond must be deposited with us and made payable only to us, and may not be modified without our approval.

(c) The lease must provide that we may adjust security or performance bond requirements at any time to reflect changing conditions.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The surety must provide notice to us at least 60 days before canceling a performance bond so that we may notify the lessee of its obligation to provide a

substitute performance bond and require collection of the bond prior to the cancellation date. Failure to provide a substitute performance bond will be a violation of the lease.

(f) We may waive the requirement for a performance bond if the lease is for religious, educational, recreational, cultural, or other public purposes, or upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner. We may revoke the waiver and require a performance bond at any time if the waiver is no longer in the best interest of the Indian landowner.

**§ 162.435 What forms of performance bond may be accepted under a business lease?**

(a) We will only accept a performance bond in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; or

(4) Surety bond issued by a company approved by the U.S. Department of the Treasury.

(b) All forms of performance bonds must:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an immediate claim upon or sell them if the lessee violates the lease;

(3) Be irrevocable during the term of the performance bond; and

(4) Be automatically renewable during the term of the lease.

**§ 162.436 What is the bond release process under a business lease?**

(a) Upon expiration, termination, or cancellation of the lease, the lessee may submit a written request for a performance bond release to BIA.

(b) Upon receipt of a request under paragraph (a) of this section, BIA will confirm with the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the lessee has complied with all lease obligations, then release the performance bond to the lessee, unless we determine that the bond must be redeemed to fulfill the contractual obligations.

**§ 162.437 Must a lessee provide insurance for a business lease?**

Except as provided in paragraph (c) of this section, a lessee must provide insurance necessary to protect the interests of the Indian landowners and in the amount sufficient to protect all insurable improvements on the premises, unless otherwise provided in the lease.

(a) Such insurance may include property, crop, liability and/or casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. We may revoke the waiver and require insurance at any time if the waiver is no longer in the best interest of the Indian landowner.

*Approval*

**§ 162.438 What documents must the parties submit to obtain BIA approval of a business lease?**

A lessee or the Indian landowner must submit the following documents to us to obtain BIA approval of a business lease:

- (a) A lease executed by the Indian landowner and the lessee that complies with the requirements of this part;
- (b) An appraisal or other valuation under § 162.421, if appropriate;
- (c) Organizational documents, certificates, filing records, and resolutions or other authorization documents, including evidence of the representative's authority to execute a lease, if the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, to show that the lease will be enforceable and that the legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;
- (d) A performance bond, where required;
- (e) Statement from appropriate tribal authority that the proposed use is in conformance with applicable tribal law;
- (f) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements;
- (g) A restoration and reclamation plan (and any subsequent modifications to the plan), if appropriate;

(h) Documents that demonstrate the lessee's technical capability to construct, operate, maintain, and terminate the proposed project and the lessee's history in successfully designing, constructing, or obtaining the funding for a project similar to the proposed project, if appropriate;

(i) A preliminary plan of development that describes the type and location of any improvements the lessee plans to construct and a schedule showing the tentative commencement and completion dates for those improvements, if appropriate;

(j) An official or a certified survey of the leased premises that includes the legal description of the land encumbered by the lease and a description of each tract of trust or restricted land in the lease and the acreage of each. We will review the survey under the DOI Standards for Indian Trust Land Boundary Evidence;

(k) Information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(l) Any additional documentation we determine to be reasonably necessary for approval.

**§ 162.439 What is the approval process for a business lease?**

(a) Before we approve a business lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) Assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a).



(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements; and

(5) If the lease is a negotiated lease, defer to the Indian landowners' determination that the lease is in their best interest, to the maximum extent possible.

(b) When we receive a business lease and all of the supporting documents that conform to this part, we will, within 60 days of the date of receipt of the documents at the appropriate BIA office, approve, disapprove, return the submission for revision, or notify the parties in writing that we need additional time to review the lease. Our letter notifying the parties that we need additional time to review the lease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease.

(c) If we fail to the deadlines in this section, then the parties may take appropriate action under part 2 of this chapter.

(d) Any lease approval or disapproval determination and the basis for the determination, along with notification of appeal rights under part 2 of this chapter, will be made in writing and will be sent to the parties to the lease.

(e) We will provide approved business leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved business leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

#### **§ 162.440 When will a business lease be effective?**

(a) A business lease will be effective on the date on which we approve the lease, notwithstanding any appeal that may be filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to a business lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

**§ 162.441 Must business lease documents be recorded?**

(a) A business lease, amendment, assignment, leasehold mortgage, and sublease must be recorded in our Land Titles and Records Office with jurisdiction over the leased land.

(1) We will record the lease or other document immediately following our approval.

(2) If our approval is not required, the parties must record the assignment or sublease in the Land Title and Records Office with jurisdiction over the leased land.

(b) The tribe must record the following leases in the Land Title and Records Office with jurisdiction over the leased lands, even though BIA approval is not required:

(1) Leases of tribal land a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval under certain conditions.

**§ 162.442 What action may BIA take if a lease disapproval decision is appealed?**

(a) If a party appeals our decision to disapprove a lease, assignment, amendment, sublease or leasehold mortgage, then the official to whom the appeal is made may require the lessee to post an appeal bond in an amount necessary to protect the Indian landowners

against financial losses and damage to trust resources likely to result from the delay caused by an appeal. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

#### *Amendments*

#### **§ 162.443 May the parties amend a business lease?**

(a) The parties may amend a business lease by obtaining:

(1) The lessee's signature;

(2) The Indian landowners' consent pursuant to the requirements contained in § 162.444; and

(3) BIA approval of the amendment under § 162.445 and § 162.446.

(b) The parties may not amend a business lease if the lease expressly prohibits amendments.

#### **§ 162.444 What are the consent requirements for an amendment to a business lease?**

(a) The Indian landowners, or their representatives under § 162.012, must consent to an amendment in the same percentages and manner as a new business lease pursuant to § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) of this section are met.

(1) The approved business lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the amendment after a specified period of time following landowners' receipt of the amendment. If the lease

provides for deemed consent, it must require the parties to submit to us: a copy of the executed amendment or other documentation of the Indian landowners' consent; proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(2) The approved business lease authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an amendment.

(b) Unless specifically authorized in the lease, the written power of attorney, or court document, Indian landowners may not be deemed to have consented, and an Indian landowner's designated representative may not negotiate or consent to an amendment that would:

- (1) Reduce the payment obligations or terms to the Indian landowners;
- (2) Increase or decrease the lease area; or
- (3) Terminate or change the term of the lease.

**§ 162.445 What is the approval process for an amendment to a business lease?**

We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to make a determination whether to approve the amendment or notify the parties in writing that we need additional time to review the amendment.

(a) Our letter notifying the parties that we need additional time to review the amendment must identify our initial concerns and invite the parties to respond within 15

days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the amendment.

(b) If we fail to send either a determination or a notification within 30 days from receipt of required documents and completion of environmental reviews or 30 days from sending the notification, the amendment is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for amendments that are deemed approved.

(c) Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

**§ 162.446 How will BIA decide whether to approve an amendment to a business lease?**

(a) We may only disapprove a business lease amendment if:

(1) The required consents have not been obtained from the parties to the lease and any mortgagees or sureties;

(2) The lessee is in violation of the lease; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We may not unreasonably withhold approval of an amendment.

*Assignments*

**§ 162.447 May a lessee assign a business lease?**

(a) A lessee may assign a business lease by meeting the consent requirements contained in § 162.448 and obtaining our approval of the assignment under § 162.449 and

§ 162.450, or by meeting the conditions in paragraphs (b) or (c) of this section, unless the lease expressly prohibits assignments.

(b) Where provided in the lease, the lessee may assign the lease to the following without meeting consent requirements or obtaining BIA approval of the assignment, as long as the lessee notifies BIA of the assignment within 30 days:

- (1) Not more than two distinct legal entities specified in the lease; or
- (2) The lessee's wholly owned subsidiaries.

(c) If a sale or foreclosure under an approved mortgage of the leasehold interest occurs and the mortgagee is the purchaser, the mortgagee/purchaser may assign the leasehold interest without meeting the consent requirements or obtaining BIA approval, as long as the assignee accepts and agrees in writing to be bound by all the terms and conditions of the lease.

**§ 162.448 What are the consent requirements for an assignment of a business lease?**

(a) The Indian landowners, or their representatives under § 162.012, must consent to an assignment of a business lease in the same percentages and manner as a new business lease pursuant to § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) of this section are met.

(1) The approved business lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment after a specified period of time following landowners' receipt of the assignment. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed assignment or other documentation of the Indian landowners' consent; proof of

mailing to any Indian landowners who are deemed to have consented; and any other pertinent information to us for review.

(2) The approved business lease authorizes one or more representatives to consent to an assignment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an assignment.

(b) The lessee must obtain the consent of the holders of any bonds or mortgages.

**§ 162.449 What is the approval process for an assignment of a business lease?**

(a) We have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to make a determination whether to approve the assignment or notify the parties that we need additional information. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we fail to meet the deadline in this section, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

**§ 162.450 How will BIA decide whether to approve an assignment of a business lease?**

(a) We may only disapprove an assignment of a business lease if:

(1) The required consents have not been obtained from the parties to the lease or the lessee's mortgagees or sureties;

(2) The lessee is in violation of the lease;

(3) The assignee does not agree to be bound by the terms of the lease; or

(4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(4) of this section, we may consider whether:

(1) The value of any part of the leased premises not covered by the assignment would be adversely affected; and

(2) If a performance bond is required, the assignee has bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable against the assignee, and that the assignee will be able to perform its obligations under the lease or assignment.

(c) We may not unreasonably withhold approval of an assignment.

#### *Subleases*

#### **§ 162.451 May a lessee sublease a business lease?**

(a) A lessee may sublease a business lease by meeting the consent requirements contained in § 162.452 and obtaining our approval of the sublease under § 162.453 and § 162.454, or by meeting the conditions in paragraph (b) of this section, unless the lease expressly prohibits subleases.

(b) Where the sublease is part of a commercial development or residential development, the lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, as long as:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) We have approved a general plan and rent schedule for the development;



(3) We have approved a sublease form for use in the project; and

(4) The parties provide BIA with a copy of the executed sublease within 30 days.

**§ 162.452 What are the consent requirements for a sublease of a business lease?**

The Indian landowners must consent to a sublease of a business lease in the same percentages and manner as a new business lease under § 162.011, unless the requirements in paragraphs (a) or (b) of this section are met.

(a) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease after a specified period of time following landowners' receipt of the sublease. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed sublease or other documentation of the Indian landowners' consent; proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(b) The lease authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a sublease.

**§ 162.453 What is the approval process for a sublease of a business lease?**

BIA has 30 days from receipt of the executed sublease, proof of required consents, and required documentation to make a determination whether to approve the sublease or notify the parties in writing that we need additional time to review the sublease.

(a) Our letter notifying the parties that we need additional time to review the sublease must identify our initial concerns and invite the parties to respond within 15

days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease.

(b) If we fail to send either a determination or a notification within 30 days from receipt of required documents or 30 days from sending the notification, the sublease is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for subleases that are deemed approved.

**§ 162.454 How will BIA decide whether to approve a sublease of a business lease?**

(a) We may only disapprove a sublease of a business lease if:

(1) The required consents have not been obtained from the parties to the lease and any mortgagees or sureties;

(2) The lessee is in violation of the lease;

(3) The lessee will not remain liable under the lease;

(4) The sublessee does not agree to be bound by the terms of the lease; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding requirement by paragraph (a)(5) of this section, we will consider whether:

(1) The value of any part of the leased premises not covered by the sublease would be adversely affected; and

(2) If a performance bond is required by the sublease, the sublessee has bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable by the lessee against the sublessee, and that the sublessee will be able to perform its obligations under the lease.

- (c) We may not unreasonably withhold approval of a sublease.

*Leasehold Mortgages*

**§ 162.455 May a lessee mortgage a business lease?**

(a) A lessee may mortgage a business lease by meeting the consent requirements contained in § 162.456 and obtaining our approval of the leasehold mortgage under § 162.457 and § 162.458, unless the lease expressly prohibits leasehold mortgages.

(b) Refer to § 162.447(c) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

**§ 162.456 What are the consent requirements for a leasehold mortgage under a business lease?**

The Indian landowners, or their representatives under § 162.012, must consent to a leasehold mortgage under a business lease in the same percentages and manner as a new business lease under § 162.011, unless the requirements in paragraphs (a), (b), or (c) of this section are met.

(a) The lease contains a general authorization for a leasehold mortgage and states what law would apply in case of foreclosure.

(b) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage after a specified period of time following landowners' receipt of the leasehold mortgage. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed leasehold mortgage or other documentation of the Indian landowners' consent; proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(c) The lease authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

**§ 162.457 What is the approval process for a leasehold mortgage under a business lease?**

(a) We have 30 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to make a determination whether to approve the leasehold mortgage or notify the parties in writing that we need additional time to review the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we fail to meet the deadline in this section, the lessee may take appropriate action under part 2 of this chapter.

**§ 162.458 How will BIA decide whether to approve a leasehold mortgage under a business lease?**

(a) We may only disapprove a leasehold mortgage under a business lease if:

(1) The required consents have not been obtained from the parties to the lease and the lessee's sureties;

(2) The leasehold mortgage covers more than the lessee's interest in the leased premises or encumbers unrelated collateral; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(3) of this section, we will consider whether:

(1) The lessee's ability to comply with the lease would be adversely affected by any new loan obligations;

(2) Any lease provisions would be modified by the leasehold mortgage;

(3) The remedies available to us or to the Indian landowners would be limited (beyond any additional notice and cure rights to be afforded to the mortgagee), in the event of a lease violation; and

(4) Any rights of the Indian landowners would be subordinated or adversely affected in the event of a loan default by the lessee.

(c) We may not unreasonably withhold approval of a leasehold mortgage.

*Effectiveness, Compliance, and Enforcement*

**§ 162.459 When will an amendment, assignment, sublease, or leasehold mortgage under a business lease be effective?**

(a) An amendment, assignment, sublease, or leasehold mortgage under a business lease will be effective when approved, notwithstanding any appeal that may be filed under part 2 of this chapter, unless approval is not required under § 162.008(b), § 162.447(b), or § 162.451(b), or the conditions in paragraph (b) of this section apply. We will provide the approved documents to the party requesting approval and, upon request, to the other parties to the agreement.

(b) If the amendment or sublease was deemed approved pursuant to § 162.445(b) or § 162.453(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review.

(c) An assignment or sublease that does not require landowner consent or BIA approval shall be effective upon execution by the parties.

**§ 162.460 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage under a business lease?**

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a business lease, we will notify the parties immediately and advise them of their right to appeal the decision under part 2 of this chapter.

**§ 162.461 May BIA investigate compliance with a business lease?**

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.

(b) If the Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

**§ 162.462 May a business lease provide for negotiated remedies in the event of a violation?**

(a) A business lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides the parties with the power to terminate the lease, BIA approval of the termination is not required and the termination is effective without BIA cancellation. The parties must notify us of the termination so that we may record it in the Land Titles and Records Office.

(b) A business lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the applicable percentage of Indian landowners under § 162.011 of this part. If the lease provides the parties with the power to terminate the lease, BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented. BIA will record the termination in the Land Titles and Records Office.

(c) The parties must notify any surety or mortgagee of a termination of a business lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease.

(e) A business lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

**§ 162.463 What will BIA do about a violation of a business lease?**

(a) If we determine there has been a violation of the conditions of a business lease, other than a violation of payment provisions covered by paragraph (b) of this section, we will promptly send the lessee and its sureties and any mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) Within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) If a violation is determined to have occurred, we will make a reasonable attempt to notify the Indian landowners.

(4) We may order the lessee to stop work.

(b) A lessee's failure to pay compensation in the time and manner required by a residential lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessees and its sureties a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which the payment was due, if the lease requires that payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The lessee must provide adequate proof of payment as required in the notice of violation.

(c) The lessee and its sureties will continue to be responsible for the obligations contained in the lease until the lease is terminated, cancelled, or expires.



**§ 162.464 What will BIA do if the lessee does not cure a violation of a business lease on time?**

(a) If the lessee does not cure a violation of a business lease within the requisite time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

(2) The Indian landowners wish to invoke any remedies available to them under the lease;

(3) We should invoke other remedies available under the lease or applicable law, including, collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) We may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and its sureties and any mortgagees a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe

for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

- (1) Explain the grounds for cancellation;
  - (2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the lease;
  - (3) Notify the lessee of their right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the lessee to post an appeal bond;
  - (4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and
  - (5) Require any other action BIA deems necessary to protect the Indian landowners.
- (d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowner may pursue any available remedies under tribal law.

**§ 162.465 Will late payment charges or special fees apply to delinquent payments due under a business lease?**

- (a) Late payment charges will apply as specified in the lease. The failure to pay such amounts will be treated as a lease violation.
- (b) The following special fees may be assessed to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to the late payment charges that must be paid to the Indian landowners under the lease:

<b>The lessee will pay...</b>	<b>For...</b>
(a) \$50.00	Dishonored checks.
(b) \$15.00	Processing of each notice or demand letter.
(c) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

**§ 162.466 How will payment rights relating to a business lease be allocated between the Indian landowners and the lessee?**

The business lease may allocate rights to payment for insurance proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the insurance policy, order, award, judgment, or other document including the lease, the Indian landowners or lessees will be entitled to receive such payments.

**§ 162.467 When will a cancellation of a business lease be effective?**

(a) A cancellation involving a business lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will be stayed if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is stayed, the lessee must continue to pay compensation and comply with the other terms of the lease.

**§ 162.468 What will BIA do if a lessee remains in possession after a business lease expires or is cancelled?**

If a lessee remains in possession after the expiration or cancellation of a business lease, we may treat the unauthorized possession as a trespass under applicable law.

Unless the applicable percentage of Indian landowners under § 162.011 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as forcible entry and detainer action.

**§ 162.469 Will BIA regulations concerning appeal bonds apply to cancellation decisions involving business leases?**

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**§ 162.470 When will BIA issue a decision on an appeal from a business leasing decision?**

BIA will issue a decision on an appeal from a business leasing decision within 60 days of receipt of all pleadings.

**§ 162.471 What happens if the lessee abandons the leased premises?**

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

14. Remove subpart F in its entirety (§ 162.600 – § 162.623) and redesignate § 162.500 - § 162.503 in subpart E as § 162.600 – § 162.603 in subpart F under the following heading:

**Subpart F—Special Requirements for Certain Reservations**

15. Add a new subpart E to read as follows:

**Subpart E—Wind and Solar Resource Leases**

*General Provisions Applicable to Both WEELs and WSR Leases*

Sec.

- |         |   |
|---------|---|
| 162.501 | What types of leases does this subpart cover? |
| 162.502 | Who must obtain a WEEL or WSR lease?          |
| 162.503 | Is there a model WEEL or WSR lease?           |

WEELs

- |         |   |
|---------|---|
| 162.511 | What is the purpose of a WEEL?  |
| 162.512 | How long may the term of a WEEL run?                                    |
| 162.513 | Are there mandatory provisions a WEEL must contain?                     |
| 162.514 | May improvements be made under a WEEL?                                  |
| 162.515 | How must a WEEL address ownership of improvements?                      |
| 162.516 | How will BIA enforce removal requirements in a WEEL?                    |
| 162.517 | What requirements for due diligence must a WEEL include?                |
| 162.518 | May a WEEL allow for compatible uses by the Indian landowner?           |
| 162.519 | Who owns the energy resource information obtained under the WEEL?       |
| 162.520 | May a lessee incorporate its WEEL analyses into its WSR lease analyses? |
| 162.521 | May a WEEL contain an option for a lessee to enter into a WSR lease?    |
| 162.522 | How may a lessee obtain an extension of an option period?               |

*Monetary Compensation Requirements*

- |         |  |
|---------|--|
| 162.523 | How much compensation must be paid under a WEEL? |
| 162.524 | Will BIA require a valuation for a WEEL?         |

*Bonding and Insurance*

- |         |  |
|---------|--|
| 162.525 | Must a lessee provide a performance bond for a WEEL? |
| 162.526 | Reserved.  |
| 162.527 | Must a lessee provide insurance for a WEEL?          |

*Approval*

162.528 What documents must the parties submit to obtain BIA approval of a WEEL?

162.529 What is the approval process for a WEEL?

*Administration*

162.530 May the parties amend, assign, sublease, or mortgage a WEEL?

162.531 Reserved.

*Compliance and Enforcement*

162.532 How does BIA ensure compliance with a WEEL?

162.533 What will BIA do if a lessee does not cure a violation of a WEEL on time?

162.534 Under what circumstance may a WEEL be terminated or cancelled?

**WSR LEASES**

162.535 What is the purpose of a WSR lease?

162.536 Must I obtain a WEEL before obtaining a WSR lease?

162.537 How long may the term of a WSR lease run?

163.538 What must the lease include if it contains an option to renew?

162.539 Are there mandatory provisions a WSR lease must contain?

162.540 May improvements be made under a WSR lease?

162.541 How must a WSR lease address ownership of improvements?

162.542 How will BIA enforce removal requirements in a WSR lease?

162.543 What requirements for due diligence must a WSR lease include?

162.544 May a WSR lease allow compatible uses?

162.545 How must a WSR lease describe the land?

*Monetary Compensation Requirements*

162.546 How much monetary compensation must be paid under a WSR lease?

162.547 Will BIA require a valuation to determine fair market rental of a WSR lease?

162.548 What type of valuation may be used to determine fair market rental for a WSR lease?

162.549 When are monetary compensation payments due under a WSR lease?

162.550 Must a WSR lease specify to whom monetary compensation payments may be made?

162.551 What form of monetary compensation payment may be accepted under a WSR lease?

162.552 May the WSR lease provide for non-monetary or varying types of compensation?

162.553 Will BIA notify a lessee when a payment is due under a WSR lease?

162.554 Must a WSR lease provide for compensation reviews or adjustments?

162.555 What other types of payments are required under a WSR lease?

*Bonding and Insurance*

- 162.559 Must a lessee provide a performance bond for a WSR lease?
- 162.560 What forms of performance bond may be accepted under a WSR lease?
- 162.561 What is the bond release process under a WSR lease?
- 162.562 Must a lessee provide insurance for a WSR lease?

#### *Approval*

- 162.563 What documents must the parties submit to obtain BIA approval of a WSR lease?
- 162.564 What is the approval process for a WSR lease?
- 162.565 When will a WSR lease be effective?
- 162.566 Must WEEL and WSR lease documents be recorded?
- 162.567 What action may BIA take if a lease disapproval decision is appealed?

#### *Amendments*

- 162.568 May the parties amend a WSR lease?
- 162.569 What are the consent requirements for an amendment to a WSR lease?
- 162.570 What is the approval process for an amendment to a WSR lease?
- 162.571 How will BIA decide whether to approve an amendment to a WSR lease?

#### *Assignments*

- 162.572 May a lessee assign a WSR lease?
- 162.573 What are the consent requirements for an assignment of a WSR lease?
- 162.574 What is the approval process for an assignment of a WSR lease?
- 162.575 How will BIA decide whether to approve an assignment of a WSR lease?

#### *Subleases*

- 162.576 May a lessee sublease a WSR lease?
- 162.577 What are the consent requirements for a sublease of a WSR lease?
- 162.578 What is the approval process for a sublease of a WSR lease?
- 162.579 How will BIA decide whether to approve a sublease of a WSR lease?

#### *Leasehold Mortgages*

- 162.580 May a lessee mortgage a WSR lease?
- 162.581 What are the consent requirements for a leasehold mortgage of a WSR lease?
- 162.582 What is the approval process for a leasehold mortgage of a WSR lease?
- 162.583 How will BIA decide whether to approve a leasehold mortgage of a WSR lease?

#### *Effectiveness, Compliance, and Enforcement*

- 162.584 When will an amendment, assignment, sublease, or leasehold mortgage under a WSR lease be effective?
- 162.585 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a WSR lease?
- 162.586 May BIA investigate compliance with a WSR lease?

- 162.587 May a WSR lease provide for negotiated remedies in the event of a violation?
- 162.588 What will BIA do about a violation of a WSR lease?
- 162.589 What will BIA do if a lessee does not cure a violation of a WSR lease on time?
- 162.590 Will late payment charges or special fees apply to delinquent payments due under a WSR lease?
- 162.591 How will payment rights relating to WSR leases be allocated between the Indian landowners and the lessee?
- 162.592 When will a cancellation of a WSR lease be effective?
- 162.593 What will BIA do if a lessee remains in possession after a WSR lease expires or is cancelled?
- 162.594 Will BIA regulations concerning appeal bonds apply to cancellation decisions involving WSR leases?
- 162.595 When will BIA issue a decision on an appeal from a WSR leasing decision?
- 162.596 What happens if the lessee abandons the leased premises?

### **Subpart E—Wind and Solar Resource Leases**

#### **GENERAL PROVISIONS APPLICABLE TO WEELs AND WSR LEASES**

##### **§ 162.501 What types of leases does this subpart cover?**

(a) This subpart covers:

(1) Wind energy evaluation leases (WEELs), which are short-term leases that authorize possession of Indian land for the purpose of installing, operating, and maintaining instrumentation, and associated infrastructure, such as meteorological towers, to evaluate wind resources for electricity generation; and

(2) Wind and solar resource (WSR) leases, which are leases that authorize possession of Indian land for the purpose of installing, operating, and maintaining instrumentation, facilities, and associated infrastructure, such as wind turbines and solar panels, to harness wind and/or solar energy to generate and supply electricity:

(i) For resale on a for-profit or non-profit basis;



- (ii) To a utility grid serving the public generally; or
- (iii) To users within the local community (e.g., on and adjacent to a reservation).
- (b) If the generation of electricity is solely to support a use approved under subpart B, Agricultural Leases; subpart C, Residential Leases; or subpart D Business Leases (including religious, educational, recreational, cultural, or other public purposes), for the same parcel of land, then the installation, operation, and maintenance of instrumentation, facilities, and associated infrastructure are governed by subpart B, C, or D, as appropriate.

**§ 162.502 Who must obtain a WEEL or WSR lease?**

- (a) Except as provided in § 162.008(b) and 162.501, anyone seeking to possess Indian land to conduct activities associated with the evaluation of wind resources must obtain a WEEL.
- (b) Except as provided in § 162.008(b) and 162.501, anyone seeking to possess Indian land to conduct activities associated with the development of wind and/or solar resources must obtain a WSR lease.
- (c) A tribe that conducts wind and solar resource activities on its tribal land does not need a WEEL or WSR under this subpart.

**§ 162.503 Is there a model WEEL or WSR lease?**

There is no model WEEL or WSR lease because of the need for flexibility in negotiating and writing WEELs and WSR leases; however, we may provide other guidance, such as checklists and a sample lease to assist in the lease negotiation process. Additionally, we may assist the Indian landowners, upon their request, in developing

appropriate lease provisions or in using tribal lease forms that conform to the requirements of this part.

## **WEELs**

### **§ 162.511 What is the purpose of a WEEL?**

A WEEL is a short-term lease that allows the lessee to use trust or restricted lands for the purpose of evaluating wind resources. The lessee may use information collected under the WEEL to assess the potential for wind energy development, and determine future placement and type of wind energy technology to use in developing the energy resource potential of the leased area.

### **§ 162.512 How long may the term of a WEEL run?**

(a) A WEEL must provide for a definite term, state if there is an option to renew and, if so, provide for a definite term for the renewal period. WEELs are for project evaluation purposes, and therefore may have:

- (1) An initial term that is no longer than 3 years; and
- (2) One renewal period not to exceed 3 years.

(b) The exercise of the option to renew must be in writing and the WEEL must specify:

- (1) The time and manner in which the option must be exercised; and
- (2) Additional consideration, if any, that will be due upon the exercise of the option to renew or the commencement of the renewal term.

### **§ 162.513 Are there mandatory provisions a WEEL must contain?**

(a) All WEELs must identify:

- (1) The tract or parcel of land being leased;

- (2) The purpose of the WEEL and authorized uses of the leased premises;
- (3) The parties to the WEEL;
- (4) The term of the WEEL;
- (5) The owner being represented and the authority under which such action is being taken, where one executes the WEEL in a representative capacity;
- (6) The citation of the statute that authorizes our approval;
- (7) Who is responsible for constructing, owning, operating, maintaining, and managing improvements, pursuant to § 162.515;
- (8) Payment requirements and late payment charges, including interest; and
- (9) Due diligence requirements, pursuant to § 162.517;
- (b) All WEELs must include the provisions:
  - (1) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of leased premises;
  - (2) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;
  - (3) Nothing in the lease would prevent or delay termination of Federal trust responsibilities for the land during the lease's term;
  - (4) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.013;
  - (5) The lessee indemnifies and holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use of the leased premises, unless the lessee would be prohibited by law from making such an agreement;

(6) In the event that historic properties, archeological resources, human remains, or other cultural items, not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease, and the lessee will contact BIA and the tribe that has jurisdiction to determine how to proceed and appropriate disposition; and

(7) BIA has the right, at any reasonable time during the term of the lease, and upon reasonable notice, to enter upon the leased premises for inspection.

**§ 162.514 May improvements be made under a WEEL?**

(a) A WEEL anticipates the installation of facilities and associated infrastructure of a size and magnitude necessary for evaluation of wind resource capacity and potential effects of development. These facilities and associated infrastructure are considered improvements. An equipment installation plan must be submitted with the lease pursuant to § 162.528(f).

(b) If any of the following changes are made to the equipment installation plan, the Indian landowners must approve the revised plan and the lessee must provide a copy of the revised plan to BIA:

- (1) Location of improvements;
- (2) Type of improvements; or
- (3) Delay of 90 days or more in any phase of development.

**§ 162.515 How must a WEEL address ownership of improvements?**

(a) A WEEL must specify who will own any improvements the lessee installs during the lease term. In addition, the WEEL must indicate whether any improvements the lessee installs:

(1) Will remain on the premises upon expiration or termination of the lease whether or not there is conversion of the WEEL to a WSR lease, in a condition satisfactory to the Indian landowners;

(2) May be conveyed to the Indian landowners during the WEEL term;

(3) Will be removed within a time period specified in WEEL, at the lessee's expense, with the leased premises to be restored as close as possible to their condition before installation of such improvements; or

(4) Will be disposed of by other specified means.

(b) A WEEL that requires the lessee to remove the improvements must also provide the Indian landowners with an option to take possession and title to the improvements if the improvements are not removed within the specified time period.

(c) Any permanent improvements on the leased land shall be subject to 25 CFR 1.4 and, in addition, shall not be subject to any fee, tax, assessment, levy, or other such charge imposed by any State or political subdivision of a State, without regard to ownership of those improvements. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

#### **§ 162.516 How will BIA enforce removal requirements in a WEEL?**

We may take appropriate enforcement action in consultation with the tribe for tribal land or, where feasible, Indian landowners for individually owned Indian land, to ensure removal of the improvements or restoration of the premises at the lessee's expense. We may take such enforcement action after termination or expiration of the WEEL.

#### **§ 162.517 What requirements for due diligence must a WEEL include?**

(a) A WEEL must require the lessee to undertake the following due diligence:

(1) Install testing and monitoring facilities within 12 months after the effective date of the WEEL or other period designated in the WEEL and consistent with the plan of development; and

(2) Provide the Indian landowners and BIA with an explanation as to good cause for any delay, the anticipated date of installation of facilities, and evidence of progress toward installing or completing testing and monitoring facilities, if installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section.

(b) Failure of the lessee to comply with the due diligence requirements of the WEEL is a violation of the WEEL and may lead to cancellation of the WEEL and the requirement that the lessee transfer of ownership of energy resource information collected under the WEEL to the Indian landowner under § 162.519.

**§ 162.518 May a WEEL allow for compatible uses by the Indian landowner?**

The WEEL may provide for the Indian landowner to use the leased premises for other noncompeting uses compatible with the purpose of the WEEL. This may include the right to lease the premises for other compatible purposes. Any such use by the Indian landowner will not reduce or offset the monetary compensation for the WEEL.

**§ 162.519 Who owns the energy resource information obtained under the WEEL?**

(a) The WEEL must specify the ownership of any energy resource information the lessee obtains during the WEEL term.

(b) Unless otherwise specified in the WEEL, the energy resource information the lessee obtains through the leased activity becomes the property of Indian landowner at

the termination or expiration of the WEEL or upon failure by the lessee to diligently install testing and monitoring facilities on the leased premises in accordance with § 162.517.

(c) BIA will keep confidential any information it is provided that is marked confidential or proprietary and that is exempt from public release, to the extent allowed by law.

**§ 162.520 May a lessee incorporate its WEEL analyses into its WSR lease analyses?**

Any analyses a lessee uses to bring a WEEL activity into compliance with applicable laws, ordinances, rules, regulations under § 162.013 and any other legal requirements may be incorporated by reference, as appropriate, into the analyses of a proposed WSR lease.

**§ 162.521 May a WEEL contain an option for the lessee to enter into a WSR lease?**

(a) A WEEL may provide for an option period following the expiration of the WEEL term during which time the lessee and the Indian landowner have the option to enter into a WSR lease if:

- (1) The option period is no more than 3 years, except as provided in § 162.522;
- (2) The intent to install energy resource development facilities is stated at the time of the initial WEEL application;
- (3) The WSR lease will be limited to the land covered by the WEEL, or a portion thereof;
- (4) The WEEL imposes due diligence requirements on the lessee;
- (5) The WEEL states the circumstances in which the option period may be terminated; and

(6) The WSR lease will be the direct result of energy resource information gathered from the WEEL activities and associated data.

(b) Our approval of a WEEL that contains an option to enter into a WSR lease does not guarantee or imply our approval of any WSR lease.

**§ 162.522 How may a lessee obtain an extension of an option period?**

(a) A lessee may request extension of the option period for a term of no more than 3 years.

(b) We will approve the extension if:

(1) The parties agree in writing to the extension and have already submitted a proposed WSR lease to us for approval; and

(2) The extension is necessary for us to complete the lease approval process.

*Monetary Compensation Requirements*

**§ 162.523 How much compensation must be paid under a WEEL?**

(a) The WEEL must state how much compensation will be paid.

(b) A WEEL must specify the date on which compensation will be due.

(c) Failure to make timely payments is a violation of the WEEL and may lead to cancellation of the WEEL.

(d) The lease compensation requirements of §§ 162.549 through 162.555, also apply to WEELs.

**§ 162.524 Will BIA require a valuation for a WEEL?**

BIA will not require a valuation for a WEEL.

*Bonding and Insurance*

**§ 162.525 Must a lessee provide a performance bond for a WEEL?**



The lessee is not required to provide a performance bond for a WEEL.

§ 162.526 Reserved.

**§ 162.527 Must a lessee provide insurance for a WEEL?**

Except as provided in paragraph (d) of this section, a lessee must provide insurance necessary to protect the interests of Indian landowners and in the amount sufficient to protect all insurable improvements on the leased premises, unless otherwise provided in the WEEL.

(a) Such insurance may include property, crop, liability and/or casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) Lease insurance may be increased and extended for use as the required WSR lease insurance.

(d) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. We may revoke the waiver and require insurance at any time if the waiver is no longer in the best interest of the Indian landowner.

*Approval*

**§ 162.528 What documents must the parties submit to obtain BIA approval of a WEEL?**

A lessee or the Indian landowner must submit the following documents to us to obtain BIA approval of a WEEL:

(a) A WEEL executed by the Indian landowners and the lessee that complies with the requirements of this part;

(b) Organizational documents, certificates, filing records, and resolutions or other authorization documents, including evidence of the representative's authority to execute a lease, if the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, to show that the WEEL will be enforceable and that the legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;

(c) Proof of insurance, as required by § 162.527;

(d) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law;

(e) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements;

(f) An equipment installation plan;

(g) A restoration and reclamation plan (and any subsequent modifications to the plan);

(h) An official or certified survey of the leased premises that includes the legal description of the land encumbered by the WEEL and a description of each tract of trust or restricted land in the WEEL and the acreage of each. We will review the survey under the DOI Standards for Indian Trust Land Boundary Evidence;

(i) Documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate resource evaluation facilities and

history in successfully designing, constructing, or obtaining the funding for a resource evaluation project (for example, documents evidencing lessee's actual ownership, development, or management of a successful similar size project within the last 5 years);

(j) Information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(k) Any additional documentation we determine to be reasonably necessary for approval.

#### **§ 162.529 What is the approval process for a WEEL?**

(a) Before we approve a WEEL, we must determine that the WEEL is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the WEEL and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) Assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) When we receive a WEEL and all of the supporting documents that conform to this part, we will, within 20 days of the date of receipt of the documents at the appropriate BIA office, approve, disapprove, return the submission for revision, or notify the parties in writing that we need additional time to review the WEEL. Our letter notifying the parties that we need additional time to review the WEEL must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from

sending the notification to make a determination whether to approve or disapprove the sublease.

(c) If we fail to meet the deadline in this section, then the parties may take appropriate action under part 2 of this chapter.

(d) In reviewing a WEEL for approval, we will defer to the Indian landowners' determination that the WEEL is in their best interest, to the maximum extent possible.

(e) Any WEEL approval or disapproval determination and the basis for the determination, along with notification of rights to appeal the determination under part 2 of this chapter, will be made in writing and will be sent to the parties

#### *Administration*

### **§ 162.530 May the parties amend, assign, sublease, or mortgage a WEEL?**

The parties may amend, assign, sublease, or mortgage a WEEL by following the procedures and requirements for amending, assigning, subleasing, or mortgaging a WSR lease.

### **§ 162.531 [Reserved]**

#### *Compliance and Enforcement*

### **§162.532 How does BIA ensure compliance with a WEEL?**

(a) If we determine that a WEEL has been violated, we will promptly send the lessee and its sureties a notice of violation. We may also order the lessee to stop work. The notice of violation must be provided by certified mail, return receipt requested.

(b) Within 5 days of the receipt of the notice of violation, the lessee must:

(1) Cure the violation and notify us in writing that the violation has been cured;

(2) Dispute our determination that a violation has occurred; or

(3) Request additional time to cure the violation.

(c) If we determine that a violation has occurred, we will make a reasonable attempt to notify the Indian landowners.

**§ 162.533 What will BIA do if a lessee does not cure a violation of a WEEL on time?**

(a) If the lessee does not cure a violation of a WEEL within the requisite time period, we will consult with the tribe for tribal land or, where feasible, Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the WEEL, or

(2) The Indian landowners wish to invoke any remedies available to them under the WEEL; or

(3) We should invoke any other remedies available to us under the WEEL.

(b) If we decide to cancel the WEEL, we will send the lessee and its sureties and any mortgagees a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the WEEL;

(3) Notify the lessee of their right to appeal under part 2 of this chapter;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action we deem necessary to protect the Indian landowners.

(c) The cancellation will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date the letter is mailed, whichever is earlier.

(d) The cancellation decision will be stayed if the lessee files an appeal unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is stayed, the lessee must continue to pay compensation and comply with the other terms of the WEEL.

(e) Nothing in this part affects BIA's ability to take emergency action to protect the leased premises under § 162.021.

**§ 162.534 Under what circumstances may a WEEL be terminated or cancelled?**

(a) A WEEL must state whether, and under what conditions, an Indian landowner may terminate the WEEL.

(b) We may cancel the WEEL if we have determined cancellation is appropriate under § 162.523 (failure to make timely payments) or § 162.533 (failure to cure a violation within the requisite time).

**WSR LEASES**

**§ 162.535 What is the purpose of a WSR lease?**

A WSR lease authorizes a lessee to possess Indian land to conduct activities related to the installation, operation, and maintenance of wind and/or solar energy resource development projects. Activities include installing instrumentation facilities,

and infrastructure associated with the generation, transmission, and storage of electricity and other related activities.

**§ 162.536 Must I obtain a WEEL before obtaining a WSR lease?**

You may enter into a WSR lease independent of a WEEL. While you may enter into a lease as a direct result of energy resource information gathered from a WEEL activity, obtaining a WEEL is not a precondition to entering into a WSR lease.

**§ 162.537 How long may the term of a WSR lease run?**

(a) A WSR lease must provide for a definite lease term, state if there is an option to renew and, if so, provide for a definite term for the renewal period. Unless authorized by paragraph (b), leases for WSR development purposes may have an initial term not to exceed 25 years and one renewal period not to exceed 25 years.

(b) If a statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), the lease may provide for a primary term, and one renewal not to exceed 25 years, so long as the maximum term, including the renewal, does not exceed the maximum term established by statute.

(c) The lease term, including any renewal, must be reasonable, given the

(1) Purpose of the lease;

(2) Type of financing; and

(3) Level of investment.

(d) Where all of the trust or restricted interests in a tract are owned by a deceased Indian whose heirs and devisees have not yet been determined, the maximum term may not exceed two years.

(e) The lease may not be extended by holdover.

**§ 162.538 What must the lease include if it contains an option to renew?**

(a) If the lease provides for an option to renew, the lease must specify:

- (1) The time and manner in which the option must be exercised or is automatically effective;
  - (2) That confirmation of the renewal will be submitted to us;
  - (3) Whether Indian landowner consent to the renewal is required;
  - (4) That the lessee must provide notice to the Indian landowner and any mortgagees of the renewal;
  - (5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the commencement of the renewal term; and
  - (6) That any change in the terms of the lease will be considered an amendment subject to consent and BIA approval requirements pursuant to §§ 162.568 to 162.571; and
  - (7) Any other conditions for renewal (e.g., the lessee may not be in violation of the lease at the time of renewal).
- (b) We must record any renewal of a lease in the Land Titles and Records Office.

**§ 162.539 Are there mandatory provisions a WSR lease must contain?**

(a) All WSR leases must identify:

- (1) The tract or parcel of land being leased;
- (2) The purpose of the lease and authorized uses of the leased premises;
- (3) The parties to the lease;
- (4) The term of the lease;



(5) The owner being represented and the authority under which such action is being taken, where one executes a lease in a representative capacity;

(6) The citation of the statute that authorizes our approval;

(7) Who is responsible for constructing, owning, operating, maintaining, and managing, WSR equipment, roads, transmission lines and related facilities;

(8) Who is responsible for evaluating the leased premises for suitability; purchasing, installing, operating, and maintaining WSR equipment; negotiating power purchase agreements; and transmission;

(9) Payment requirements and late payment charges, including interest;

(10) Due diligence requirements, pursuant to § 162.543;

(11) Insurance requirements; and

(12) Bonding requirements under § 162.559. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety or guarantor for any legal instrument that directly affects their obligations and liabilities.

(b) All WSR leases must include the following provisions:

(1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(2) Nothing in the lease would prevent or delay termination of Federal trust responsibilities for the land during the lease's term;

(3) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;

(4) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.013;

(5) The lessee indemnifies and holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(6) In the event that historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with the lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe that has jurisdiction to determine how to proceed and appropriate disposition;

(7) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, to enter upon the leased premises for inspection; and

(8) Unless otherwise indicated, this is a lease of the trust and restricted interests in the property described and is not a lease of any undivided fee interests. All compensation payments by the lessee will be distributed to the trust and restricted landowners and life estate holders on trust and restricted land only. The lessee will be responsible for accounting to the owners of any fee interests that may exist in the property being leased.

(c) We may treat any provision of a lease, sublease, assignment, amendment or mortgage that is in violation of Federal law as a violation of the lease.

**§ 162.540 May improvements be made under a WSR lease?**

(a) A WSR lease must provide for the installation of a facility and associated infrastructure of a size and magnitude necessary for the generation and delivery of electricity. These facilities and associated infrastructure are considered improvements. A

resource development plan must be submitted for approval with the lease pursuant to § 162.563(g).

(b) If any of the following changes are made to the resource development plan, the Indian landowner and BIA must approve the revised plan:

- (1) Location of improvements;
- (2) Type of improvements; or
- (3) Delay of 90 days or more in any phase of development.

**§ 162.541 How must a WSR lease address ownership of improvements?**

(a) A WSR lease must specify who will own any improvements the lessee installs during the lease term and may specify that any improvements the lessee installs may be conveyed to the Indian landowners during the lease term and under what conditions the improvements may be conveyed. In addition, the lease must indicate whether each specific improvement the lessee installs will, upon the expiration or termination of the lease:

- (1) Remain on the leased premises, in a condition satisfactory to the Indian landowners and become the property of the Indian landowner;
- (2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as close as possible to their condition before installation of such improvements; or
- (3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the improvements must also provide the Indian landowners with an option to take possession of and title to the improvements if the improvements are not removed within the specified time period.

**§ 162.542 How will BIA enforce removal requirements in a WSR lease?**

We may take appropriate enforcement action in consultation with the tribe, for tribal land or, where feasible, Indian landowners for individually owned Indian land, to ensure removal of the improvements or restoration of the premises at the lessee's expense. We may take such enforcement action after termination or expiration of the lease. We may collect and hold the performance bond until removal and restoration are completed.

**§ 162.543 What requirements for due diligence must a WSR lease include?**

(a) A WSR lease must include due diligence requirements that require the lessee to:

(1) Commence installation of energy facilities within 2 years after the effective date of the lease or consistent with a timeframe contained in the resource development plan;

(2) Provide the Indian landowners and BIA good cause as to the nature of any delay, the anticipated date of installation of facilities, and evidence of progress toward commencement of installation, if installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section;

(3) Maintain all on-site electrical generation equipment and facilities and related infrastructure in accordance with the design standards in the resource development plan; and

(4) Repair, place into service, or remove from the site within 30 days any idle, improperly functioning, or abandoned equipment or facilities that have been inoperative for any continuous period of 3 months (unless the equipment or facilities were idle as a

result of planned suspension of operations, for example, for grid operations or during bird migration season).

(b) Failure of the lessee to comply with the due diligence requirements of the lease is a violation of the lease and may lead to cancellation of the lease under § 162.589.

**§ 162.544 May a WSR lease allow compatible uses?**

The lease may provide for the Indian landowner to use, or authorize others to use, the leased premises for other uses compatible with the purpose of the WSR lease and consistent with the terms of the WSR lease. This may include the right to lease the premises for other compatible purposes. Any such use or authorization by the Indian landowner will not reduce or offset the monetary compensation for the WSR lease.

**§ 162.545 How must a WSR lease describe the land?**

(a) A WSR lease must describe the leased premises by reference to an official or certified survey as required by § 162.563(i) of this part.

(b) If the tract is fractionated, we will describe the undivided trust interest in the leased premises.

*Monetary Compensation Requirements*

**§ 162.546 How much monetary compensation must be paid under a WSR lease?**

(a) A WSR lease of tribal land may allow for any payment negotiated by the tribe as long as the tribe provides the tribal authorization required by § 162.547(a). The tribe may request, in writing, that we require fair market rental, in which case we will determine fair market rental in accordance with § 162.548 and will approve the lease only if it requires payment of not less than fair market rental. Unless the tribe makes such a request, BIA will not require a valuation or appraisal or determine fair market rental, but

instead will defer to the tribe's determination that the negotiated compensation is in its best interest.

(b) A WSR lease of individually owned Indian land must require payment of not less than fair market rental before any adjustments, based on a fixed amount, a percentage of the projected gross income, megawatt capacity fee, or some other method, unless

paragraphs (a)(1) or (a)(2) of this section permit a lesser amount. The lease must establish how the fixed amount, percentage or combination will be calculated and the frequency at which the payments will be made.

(1) We may approve a lease of individually owned Indian land that provides for the payment of nominal compensation, or less than a fair market rental, if:

(i) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(ii) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(A) The lessee is a member of the Indian landowners' immediate family as defined in § 162.003;

(B) The lessee is a co-owner of the leased tract;

(C) A special relationship or circumstances exist that we believe warrant approval of the lease; or

(D) The lease is for public purposes.

(2) We may approve a lease that provides for the payment of less than a fair market rental during the periods before the generation and transmission of electricity begins, if we determine it is in the Indian landowners' best interest. The lease must specify the amount of the compensation and the applicable periods.

(3) Where the owners of the applicable percentage of interests under §162.011 of this part grant a WSR lease on behalf of all of the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners, and those on whose behalf we have consented, receive a fair market rental.

**§ 162.547 Will BIA require a valuation to determine fair market rental of a WSR lease?**

(a) We will not require valuations or appraisals for negotiated WSR leases of tribal land, or of any undivided tribal interest in a fractionated tract, if the tribe submits a tribal authorization expressly stating that it:

- (1) Has negotiated compensation satisfactory to the tribe;
- (2) Waives valuation and appraisal; and
- (3) Has determined that accepting such negotiated compensation and waiving valuation and appraisal is in its best interest.

(b) The tribe may request that BIA require a valuation or appraisal, in which case BIA must determine fair market rental in accordance with § 162.548.

(c) We will not waive the valuation requirement for WSR leases on individually owned Indian land, but we may accept an economic analysis in lieu of an appraisal if we determine it to be in the best interest of the Indian landowners and:

- (1) The Indian landowners submit a written statement to us requesting an economic analysis in lieu of an appraisal and explaining the basis for the request and their willingness to accept nominal or less than fair market rental;
- (2) After receiving an estimated timeframe for completion of the analysis from the Office of Indian Energy & Economic Development (IEED), the Indian landowner submits a written request for economic analysis to IEED; and
- (3) IEED prepares an economic analysis of the project.

**§ 162.548 What type of valuation may be used to determine fair market rental for a WSR lease?**



(a) We will use an appraisal to determine the fair market rental before we approve a WSR lease of individually owned Indian land, or at the request of the tribe for tribal land, unless we approve another type of valuation under paragraph (d) of this section.

(b) We will either:

(1) Prepare an appraisal; or

(2) Use an approved appraisal from the Indian landowner or lessee.

(c) We will approve an appraisal for use only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214; and

(2) Complies with Department policies regarding appraisals, including third-party appraisals.

(d) Upon receipt of a tribal authorization, we may use some other type of valuation for a WSR lease on tribal land, if it conforms to USPAP or a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214.

**§ 162.549 When are monetary compensation payments due under a WSR lease?**

(a) A WSR lease must specify the dates on which all payments are due.

(b) Unless otherwise provided in the lease, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

**§ 162.550 Must a WSR lease specify to whom monetary compensation payments may be made?**

(a) A WSR lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners whose trust accounts are unencumbered when there are 10 or fewer beneficial owners and 100 percent of the beneficial owners agree to receive payment directly from the lessee.

(1) If the lease provides that the lessee will directly pay the Indian landowners, the lease must also require that the lessee provide us with certification of payment.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us.

(3) The lessee must send direct payments to the parties and addresses specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless otherwise provided in the lease, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except if:

(i) 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement, then the lessee must make all Indian landowners' payments to us; or

(ii) If any individual Indian landowner dies, is declared non compos mentis, becomes whereabouts unknown, or owes a debt resulting in a trust account encumbrance, then the lessee must make that individual Indian landowner's payment to us.

**§ 162.551 What form of monetary compensation payment may be accepted under a WSR lease?**

(a) When payments are made directly to Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) When payments are made to us, we will accept:

(1) Money orders;

(2) Certified checks;

(3) Cashier's checks; or

(4) Electronic funds transfer payments.

(c) We will not accept cash, foreign currency, or third-party checks except for third-party checks from financial institutions.

(d) The preferred method of payment is electronic funds transfer payments.

**§ 162.552 May the WSR lease provide for non-monetary or varying types of compensation?**

(a) With our approval, the lease may provide for:

(1) Alternative forms of compensation, including but not limited to in-kind consideration and payments based on percentage of income; or

(2) Varying types of consideration at specific stages during the life of the lease, including but not limited to fixed annual payments during installation, payments based on income during an operational period, and bonuses.

(b) For individually owned land, we will approve alternative forms of compensation and varying types of consideration if we determine that it is in the best interest of the Indian landowners. For tribal land, we will defer to the tribe's determination that the alternative forms of rental and varying types of consideration are

in its best interest, if the tribe submits a signed certification stating that it has determined the alternative forms of rental and varying types of consideration to be in its best interest.

**§ 162.553 Will BIA notify a lessee when a payment is due under a WSR lease?**

Upon request of the Indian landowner, we may issue invoices to a lessee in advance of the dates on which payments are due under a WSR lease, but the lessee's obligation to make such payments in a timely manner will not be excused if such invoices are not delivered or received.

**§ 162.554 Must a WSR lease provide for compensation reviews or adjustments?**

(a) A review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease, unless the conditions in paragraph (b) of this section are met. The lease must specify:

- (1) When adjustments take effect;
- (2) Who is authorized to make adjustments;
- (3) What the adjustments are based on; and
- (4) How to resolve disputes arising from the adjustments.

(b) A review of the adequacy of compensation is not required if:

- (1) The lease provides for automatic adjustments; or

(2) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

- (i) The lease provides for payment of less than fair market rental;
- (ii) The lease is for public purposes; or

(iii) The lease provides for most or all of the compensation to be paid during the first five years of the lease term or prior to the date the review would be conducted.

(c) When a review results in the need for adjustment of compensation, we must approve the adjustment and Indian landowners must consent to the adjustment in accordance with § 162.011, unless otherwise provided in the lease.

**§ 162.555 What other types of payments are required under a WSR lease?**

(a) The lessee may be required to pay additional fees, taxes, and/or assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.515(c). The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. Failure to make such payments will be treated as a violation of the lease.

(c) Where the property is subject to at least one other lease for another compatible use, such as grazing, the lessees may agree among themselves as to how to allocate payment of the operation and maintenance charges.

*Bonding and Insurance*

**§ 162.559 Must a lessee provide a performance bond for a WSR lease?**

(a) Except as provided in paragraph (f) of this section, the lessee must provide a performance bond in an amount sufficient to secure the contractual obligations including:

(1) No less than the highest annual rental specified in the lease, if the compensation is paid annually, or other amount established by BIA in consultation with

the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land, if the compensation is to be paid on a non-annual schedule;

(2) The performance and payment for the installation of any required improvements;

(3) The operation and maintenance charges for any land located within an irrigation project; and

(4) The restoration and reclamation of the leased premises, to their condition at the commencement of the lease term or some other specified condition.

(b) The performance bond must be deposited with us and made payable only to us, and may not be modified without our approval.

(c) The lease must provide that we may adjust security or performance bond requirements at any time to reflect changing conditions.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The surety must provide notice to us at least 60 days before canceling a performance bond so that we may notify the lessee of its obligation to provide a substitute performance bond and require collection of the bond prior to the cancellation date. Failure to provide a substitute performance bond will be a violation of the lease.

(f) We may waive the requirement for a performance bond upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. We may revoke the

waiver and require a performance bond at any time if the waiver is no longer in the best interest of the Indian landowner.

**§ 162.560 What forms of performance bond may be accepted under a WSR lease?**

(a) We will only accept a performance bond in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; or

(4) Surety bond issued by a company approved by the U.S. Department of the Treasury.

(b) All forms of performance bonds must:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an immediate claim upon or sell them if the lessee violates the terms of the lease;

(3) Be irrevocable during the term of the performance bond; and

(4) Be automatically renewable during the term of the lease.

**§ 162.561 What is the bond release process under a WSR lease?**

(a) Upon expiration, termination, or cancellation of the lease, the lessee must submit a written request for a performance bond release to BIA.

(b) Upon receipt of the request under paragraph (a) of this section, BIA will confirm with the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the lessee has complied with all lease obligations,

then release the performance bond to the lessee unless we determine that the performance bond must be redeemed to fulfill the contractual obligations.

**§ 162.562 Must a lessee provide insurance for a WSR lease?**

Except as provided in paragraph (c) of this section, a lessee must provide insurance when necessary to protect the interests of Indian landowners and in the amount sufficient to protect all insurable improvements on the leased premises.

(a) Such insurance may include property, liability and/or casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. We may revoke the waiver and require insurance at any time if the waiver is no longer in the best interest of the Indian landowner.

*Approval*

**§ 162.563 What documents must the parties submit to obtain BIA approval of a WSR lease?**

A lessee or the Indian landowner must submit the following documents to us to obtain BIA approval of a WSR lease:

(a) A lease executed by the Indian landowner and the lessee that complies with the requirements of this part;

(b) An appraisal or other valuation under § 162.547, if appropriate;



(c) Organizational documents, certificates, filing records, and resolutions or other authorization documents, including evidence of the representative's authority to execute a lease, if the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, to show that the lease will be enforceable and that the legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;

(d) A performance bond, where required;

(e) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law;

(f) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance applicable Federal and tribal environmental and land use requirements;

(g) A resource development plan that describes the type and location of any improvements the lessee plans to install and a schedule showing the tentative commencement and completion dates for those improvements;

(h) A restoration and reclamation plan (and any subsequent modifications to the plan);

(i) An official or a certified survey of the leased premises that includes the legal description of the land encumbered by the lease and a description of each tract of trust or restricted land in the lease and the acreage of each. We will review the survey under the DOI Standards for Indian Trust Land Boundary Evidence;

(j) Documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate resource development facilities and

the lessee's history in successfully designing, constructing, or obtaining the funding for a resource development project (for example, documents evidencing lessee's actual ownership, development, or management of a successful similarly-sized project within the last 5 years);

(k) Information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(l) Any additional documentation we determine to be reasonably necessary for approval.

**§ 162.564 What is the approval process for a WSR lease?**

(a) Before we approve a WSR lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) Assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a);

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements; and

(5) If the lease is a negotiated lease, defer to the Indian landowners' determination that the lease is in their best interest, to the maximum extent possible.

(b) When we receive a WSR lease proposal and all of the supporting documents that conform to this part, we will, within 60 days of the date of receipt of the documents at the appropriate BIA office, approve, disapprove, return the submission for revision, or

notify the parties in writing that we need additional time to review the lease. Our letter notifying the parties that we need additional time to review the lease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease.

(c) If we fail to meet the deadlines in this section, then the parties may take appropriate action under part 2 of this chapter.

(d) We will make any lease approval or disapproval determination and the basis for the determination, along with notification of appeal rights under part 2 of this chapter, in writing and will send the determination and notification to the parties to the lease.

(e) We will provide approved WSR leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved WSR leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

**§ 162.565 When will a WSR lease be effective?**

(a) A WSR lease will be effective on the date on which we approve the lease, notwithstanding any appeal that may be filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to a WSR lease are triggered. Such date may be before or after the approval date under paragraph (a).

**§ 162.566 Must WEEL and WSR lease documents be recorded?**

(a) A WEEL and WSR lease, amendment, assignment, leasehold mortgage, and sublease, must be recorded in our Land Titles and Records Office with jurisdiction over

the leased land.

(1) We will record the lease, or other document immediately following our approval.

(2) If our approval is not required, the parties must record the assignment or sublease in the Land Title and Records Office with jurisdiction over the leased land.

(b) The tribe must record the following leases in the Land Titles and Records Office with jurisdiction over the tribal lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval.

**§ 162.567 What action may BIA take if a lease disapproval decision is appealed?**

(a) If a party appeals our decision to disapprove a lease, assignment, amendment, sublease or leasehold mortgage, then the official to whom the appeal is made may require the lessee to post an appeal bond in an amount necessary to protect the Indian landowners against financial losses and damage to trust resources likely to result from the delay caused by an appeal. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

*Amendments*

**§ 162.568 May the parties amend a WSR lease?**

(a) The parties may amend a WSR lease by obtaining:

(1) The lessee's signature;

(2) The Indian landowners' consent pursuant to the requirements contained in § 162.569; and

(3) BIA approval of the amendment under § 162.570 and § 162.571.

(b) The parties may not amend a WSR lease if the lease expressly prohibits amendments.

**§ 162.569 What are the consent requirements for an amendment to a WSR lease?**

(a) The Indian landowners, or their representatives under § 162.012, must consent to an amendment of a WSR lease in the same percentages and manner as a new WSR lease pursuant to § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) are met.

(1) The approved WSR lease establishes that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment after a specified period of time following landowners' receipt of the amendment. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed amendment or other documentation of the Indian landowners' consent; proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and any other pertinent information to us for review.

(2) The approved WSR lease authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an amendment.

(b) Unless specifically authorized in the lease, the written power of attorney, or court document, Indian landowners may not be deemed to have consented, and an Indian landowner's designated representative may not negotiate or consent to an amendment that would:

- (1) Reduce the payment obligations or terms to the Indian landowners;
- (2) Increase or decrease the lease area; or
- (3) Terminate or change the term of the lease.

**§ 162.570 What is the approval process for an amendment to a WSR lease?**

We have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to make a determination whether to approve the amendment or notify the parties in writing that we need additional time to review the amendment.

(a) Our letter notifying the parties that we need additional time to review the amendment must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the amendment.

(b) If we fail to send either a determination or a notification within 30 days from receipt of required documents and the completion of any environmental reviews or 30 days from sending the notification, the amendment is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for amendments that are deemed approved.

(c) Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

**§ 162.571 How will BIA decide whether to approve an amendment to a WSR lease?**

(a) We may only disapprove a WSR lease amendment if:

(1) The required consents have not been obtained from the parties to the lease and any mortgagees or sureties;

(2) The lessee is in violation of the lease; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We may not unreasonably withhold approval of an amendment.

*Assignments*

**§ 162.572 May a lessee assign a WSR lease?**

(a) A lessee may assign a WSR lease by meeting the consent requirements contained in § 162.573 and obtaining our approval of the assignment under § 162.574 and § 162.575 or by meeting the conditions in paragraphs (b) or (c) of this section, unless the lease expressly prohibits assignments.

(b) Where provided in the lease, the lessee may assign the lease to the following without meeting consent requirements or obtaining BIA approval of the assignment, as long as the lessee notifies BIA of the assignment within 30 days:

(1) Not more than two distinct legal entities specified in the lease; or

(2) The lessee's wholly owned subsidiaries.

(c) If a sale or foreclosure under an approved mortgage of the leasehold interest occurs and the mortgagee is the purchaser, the mortgagee/purchaser may assign the leasehold interest without meeting the consent requirements or obtaining our approval, as

long as the assignee accepts and agrees in writing to be bound by all the terms and conditions of the lease.

**§ 162.573 What are the consent requirements for an assignment of a WSR lease?**

The Indian landowners, or their representatives under § 162.012, must consent to an assignment in the same percentages and manner as a new WSR lease, unless the requirements in paragraphs (a) or (b) of this section are met.

(a) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment after a specified period of time following landowners' receipt of the assignment. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed assignment or other documentation of the Indian landowners' consent; proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(b) The approved WSR lease authorizes one or more representatives to consent to an assignment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an assignment.

**§ 162.574 What is the approval process for an assignment of a WSR lease?**

(a) We have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to make a determination whether to approve the assignment or notify the parties that we need additional information. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.



(b) If we fail to meet any of the deadlines in this section, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

**§ 162.575 How will BIA decide whether to approve an assignment of a WSR lease?**

(a) We may only disapprove an assignment of a WSR lease if:

(1) The required consents have not been obtained from the parties to the lease or the lessee's mortgagees or sureties;

(2) The lessee is in violation of the lease;

(3) The assignee does not agree to be bound by the terms of the lease; or

(4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(4) of this section, we will consider whether:

(1) The value of any part of the leased premises not covered by the assignment would be adversely affected; and

(2) If a performance bond is required, the assignee has bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable against the assignee, and that the assignee will be able to perform its obligations under the lease or assignment.

(c) We may not unreasonably withhold approval of an assignment.

*Subleases*

**§ 162.576 May a lessee sublease a WSR lease?**

A lessee may sublease a WSR lease by meeting the consent requirements contained in § 162.577 and obtaining our approval of the sublease under § 162.578 and § 162.579, unless the lease expressly prohibits subleases.

**§ 162.577 What are the consent requirements for a sublease of a WSR lease?**

The Indian landowners, or their representatives under § 162.012, must consent to a sublease in the same percentages and manner as a new WSR lease under § 162.011, unless the requirements in paragraphs (a) or (b) of this section are met.

(a) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease after a specified period of time following landowners' receipt of the sublease. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed sublease or other documentation of the Indian landowners' consent; proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(b) The approved WSR lease authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a sublease.

**§ 162.578 What is the approval process for a sublease of a WSR lease?**

We have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to make a determination whether to approve the sublease or notify the parties to the sublease and Indian landowners in writing that we need additional time to review the sublease. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(a) Our letter notifying parties that we need additional time to review the sublease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease.

(b) If we fail to send either a determination or a notification within 30 days from receipt of required documents or 30 days from sending the notification, the sublease is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for subleases that are deemed approved.

**§ 162.579 How will BIA decide whether to approve a sublease of a WSR lease?**

(a) We will only disapprove a sublease of a WSR lease if:

(1) The required consents have not been obtained from the parties to the lease and the lessee's mortgagees or sureties;

(2) The lessee is in violation of the lease;

(3) The lessee will not remain liable under the lease;

(4) The sublessee does not agree to be bound by the terms of the lease; and

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(5) of this section, we will consider whether:

(1) The value of any part of the leased premises not covered by the sublease would be adversely affected; and

(2) The sublessee has bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable against the sublessee, and that the sublessee will be able to perform its obligations under the lease or sublease.

(c) We may not unreasonably withhold approval of a sublease.

### *Leasehold Mortgages*

#### **§ 162.580 May a lessee mortgage a WSR lease?**

A lessee may mortgage a WSR lease by meeting the consent requirements contained in § 162.581 and obtaining our approval of the leasehold mortgage under § 162.582 and § 162.583, unless the lease expressly prohibits leasehold mortgages.

#### **§ 162.581 What are the consent requirements for a leasehold mortgage of a WSR lease?**

The Indian landowners, or their representatives under § 162.012, must consent to a leasehold mortgage in the same percentages and manner as a new WSR lease under § 162.011, unless the requirements in paragraphs (a), (b), or (c) of this section are met.

(a) The lease contains a general authorization for a leasehold mortgage and states what law would apply in case of foreclosure.

(b) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage after a specified period of time following landowners' receipt of the leasehold mortgage. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed leasehold mortgage or other documentation of the Indian landowners' consent; proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(c) The approved WSR lease authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

**§ 162.582 What is the approval process for a leasehold mortgage of a WSR lease?**

(a) We have 30 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to make a determination whether to approve the leasehold mortgage or notify the parties in writing that we need additional time to review the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we fail to meet the deadline in this section, the lessee may take appropriate action under part 2 of this chapter.

**§ 162.583 How will BIA decide whether to approve a leasehold mortgage of a WSR lease?**

(a) We may only disapprove a leasehold mortgage under a WSR lease if:

(1) The required consents have not been obtained from the parties to the lease under or the lessee's sureties;

(2) The leasehold mortgage covers more than the lessee's interest in the leased premises collateral or encumbers unrelated collateral; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(3) of this section, we will consider whether:

(1) The lessee's ability to comply with the lease would be adversely affected by any new loan obligations;

(2) Any lease provisions would be modified by the leasehold mortgage;

(3) The remedies available to us or to the Indian landowners would be limited (beyond any additional notice and cure rights to be afforded to the mortgagee), in the event of a lease violation; and

(4) Any rights of the Indian landowners would be subordinated or adversely affected in the event of a loan default by the lessee.

(c) We may not unreasonably withhold approval of a leasehold mortgage.

*Effectiveness, Compliance, and Enforcement*

**§ 162.584 When will an amendment, assignment, sublease, or leasehold mortgage under a WSR lease be effective?**

(a) An amendment, assignment, sublease, or leasehold mortgage under a WSR lease will be effective when approved, notwithstanding any appeal that may be filed under part 2 of this chapter, unless approval is not required under § 162.008(b) or the conditions in paragraph (b) apply. We will provide copies of approved documents to the party requesting approval and, upon request, to the other parties to the agreement.

(b) If the amendment or sublease was deemed approved pursuant to § 162.570(b) or § 162.578(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review.

(c) An assignment that has does not require landowner consent or BIA approval shall be effective upon execution by the parties.

**§ 162.585 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a WSR lease?**

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a WSR lease, we will notify the parties immediately and advise them of their right to appeal the decision under part 2 of this chapter.

**§ 162.586 May BIA investigate compliance with a WSR lease?**

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.

(b) If the Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

**§ 162.587 May a WSR lease provide for negotiated remedies in the event of a violation?**

(a) A WSR lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides the parties with the power to terminate the lease, BIA approval of the termination is not required and the termination is effective without BIA cancellation. The parties must notify us of the termination so that we may record it in the Land Titles and Records Office.

(b) A WSR lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which

those remedies may be exercised by or on behalf of the applicable percentage of Indian landowners under § 162.011 of this part. If the lease provides the parties with the power to terminate the lease, BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented. BIA will record the termination in the Land Titles and Records Office.

(c) The parties must notify any surety or mortgagee of a termination of a WSR lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease.

(e) A WSR lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

#### **§ 162.588 What will BIA do about a violation of a WSR lease?**

(a) If we determine there has been a violation of the conditions of a WSR lease, other than a violation of payment provisions covered by paragraph (b) of this section, we will promptly send the lessee and its sureties and any mortgagee a notice of violation. The notice of violation must be provided by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) Within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us in writing that the violation has been cured;



- (ii) Dispute our determination that a violation has occurred; or
  - (iii) Request additional time to cure the violation.
- (3) If a violation is determined to have occurred, we will make a reasonable attempt to notify the Indian landowners.
- (4) We may order the lessee to stop work.
- (b) A lessee's failure to pay compensation in the time and manner required by a residential lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.
  - (1) We will send the lessees and its sureties a notice of violation by certified mail, return receipt requested:
    - (i) Promptly following the date on which payment was due, if the lease requires that payments be made to us; or
    - (ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.
  - (2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.
  - (3) The lessee must provide adequate proof of payment as required in the notice of violation.
  - (c) The lessee and its sureties will continue to be responsible for the obligations contained in the lease until the lease is terminated, cancelled, or expires.
  - (d) Nothing in this part affects BIA's ability to take emergency action to protect the leased premises under § 162.021.

**§ 162.589 What will BIA do if a lessee does not cure a violation of a WSR lease on time?**

(a) If the lessee does not cure a violation of a WSR lease within the requisite time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

(2) The Indian landowners wish to invoke any remedies available to them under the lease;

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) We may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and its sureties and any mortgagees a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe

for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

- (1) Explain the grounds for cancellation;
  - (2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the lease;
  - (3) Notify the lessee of their right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the lessee to post an appeal bond;
  - (4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and
  - (5) Require any other action BIA deems necessary to protect the Indian landowners.
- (d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowner may pursue any available remedies under tribal law.

**§ 162.590 Will late payment charges or special fees apply to delinquent payments due under a WSR lease?**

- (a) Late payment charges will apply as specified in the lease. The failure to pay such amounts will be treated as a lease violation.
- (b) The following special fees may be assessed to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to late payment charges that must be paid to the Indian landowners under the lease:

<b>The lessee will pay...</b>	<b>For...</b>
(a) \$50.00	Dishonored checks.
(b) \$15.00	Processing of each notice or demand letter.
(c) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

**§ 162.591 How will payment rights relating to WSR leases be allocated between the Indian landowners and the lessee?**

The WSR lease may allocate rights to payment for insurance proceeds, trespass damages, compensation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the insurance policy, order, award, judgment, or other document including the lease, the Indian landowners will be entitled to receive such payments.

**§ 162.592 When will a cancellation of a WSR lease be effective?**

(a) A cancellation involving a WSR lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will be stayed if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is stayed, the lessee must continue to pay compensation and comply with the other terms of the lease.

**§ 162.593 What will BIA do if a lessee remains in possession after a WSR lease expires or is cancelled?**

If a lessee remains in possession after the expiration or cancellation of a lease, we may treat the unauthorized possession as a trespass under applicable law. Unless the

applicable percentage of Indian landowners under § 162.011 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as forcible entry and detainer action.

**§ 162.594 Will BIA regulations concerning appeal bonds apply to cancellation decisions involving WSR leases?**

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions.

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**§162.595 When will BIA issue a decision on an appeal from a WSR leasing decision?**

BIA will issue a decision on an appeal from a leasing decision within 60 days of receipt of all pleadings.

**§ 162.596 What happens if the lessee abandons the leased premises?**

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

16. Add a new subpart G to read as follows:

### **Subpart G – Records**

Sec.

- 162.701 Who owns the records associated with this part?
- 162.702 How must records associated with this part be preserved?
- 162.703 How does the Paperwork Reduction Act affect this part?

### **Subpart G – Records**

#### **§ 162.701 Who owns the records associated with this part?**

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a Federal trust function under 25 U.S.C. 450f et. seq., including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a Federal trust function under this part.

(b) Records not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part are the property of the tribe.

#### **§ 162.702 How must records associated with this part be preserved?**

(a) Any organization, including tribes and tribal organizations, that has records identified in § 162.701(a) of this part, must preserve the records in accordance with approved Departmental records retention procedures under the Federal Records Act, 44 U.S.C. Chapters 29, 31 and 33. These records and related records management practices and safeguards required under the Federal Records Act are subject to inspection by the Secretary and the Archivist of the United States.

(b) A tribe or tribal organization should preserve the records identified in § 162.701(b) of this part, for the period of time authorized by the Archivist of the United States for similar Department of the Interior records in accordance with 44 U.S.C.

Chapter 33. If a tribe or tribal organization does not preserve records associated with its conduct of business with the Department of the Interior under this part, it may prevent the tribe or tribal organization from being able to adequately document essential transactions or furnish information necessary to protect its legal and financial rights or those of persons directly affected by its activities.

**§ 162.703 How does the Paperwork Reduction Act affect this part?**

The collections of information contained in this part, have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned OMB Control Number 1076-0155. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

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Assistant Secretary – Indian Affairs

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